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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JOHN J. KORESKO, V; REGIONAL EMPLOYERS'; ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC.; AND KORESKO & ASSOCIATES,

Petitioners,

v.

ELAINE L .CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX
Volume II of II (pages 341a-end)

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APPENDIX I – ORDER AND MEMORANDUM OF THE DISTRICT COURT, FILED MAY 11, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELAINE L. CHAO,	:	
SECRETARY OF LABOR,	:	
UNITED STATES	:	
DEPARTMENT OF LABOR	:	
Petitioner	:	
v.	:	
JOHN KORESKO, et al.	:	
Respondents	:	No. 04-MC-74

ORDER

AND NOW, this 11th day of May, 2004, following a hearing in the above captioned case on May 10, 2004, and upon consideration of the Petition to Enforce Administrative Subpoenas (Docket No. 1), the responses thereto, the Petitioner's Motion to Quash Subpoena and Motion to Limine (Docket No. 6), and the response thereto, IT IS HEREBY ORDERED that the Petition to Enforce Administrative Subpoenas is GRANTED in part and HELD IN ABEYANCE in part; and the Petitioner's Motion to Quash Subpoena and Motion in Limine is GRANTED for the reasons given in a memoran-

dum of today's date. IT IS FURTHER ORDERED that the parties shall attempt to resolve the specific objections to the subpoenas by June 1, 2004. If they cannot resolve the dispute, they may present the dispute to the Court, and the Court will resolve the matter.

BY THE COURT:

_____

MARY A. MCLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	:	
Petitioner	:	
v.	:	
JOHN KORESKO, et al.	:	
Respondents	:	No. 04-MC-74

MEMORANDUM AND ORDER

McLaughlin, J. May 11, 2004

This action was brought by the petitioner to compel John Koresko, V., Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., and Koresko & Associates (collectively "the respondents") to comply with the subpoenas duces tecum issued and directed to them on January 28, 2004, by the Regional Director of the Philadelphia Region of the Employee Benefits Security Administration ("EBSA"), United States Department of Labor ("DOL"), in an investigation being conducted pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA").

On April 19, 2004, the Secretary of Labor filed the petition to enforce the administrative subpoenas. On April 20, 2004, the Court issued an Order requiring the respondents to show cause why they should not be required to produce the requested records and scheduled a hearing for May 10, 2004. On April 28, 2004, the respondents subpoenaed EBSA Investigator Bindu George to appear and testify at the hearing to show cause and to produce documents relating to EBSA's investigation of respondents.

The first question before the Court is whether the respondents must comply with the subpoenas. The respondents object to the subpoenas on the grounds that they are not generally enforceable and on the grounds that they request privileged information. The Court will address the general challenge to the subpoenas in this Order, not the specific objections related to privilege.[1] The second question before the Court is whether the subpoena requiring Investigator George to produce documents relating to the investigation of the respondents should be quashed.

The requirements for the enforcement of an administrative subpoena duces tecum are as follows: "(1) the inquiry must be within the authority of the agency, (2) the demand for production must not be too indefinite, and (3) the information sought must be reasonably relevant to the authorized inquiry." U.S. v. Westinghouse Electric Corp., 638 F.3d 570, 574 (3d Cir. 1980).

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[1] The Court will address the issues related to privilege in a later Order if the parties are unable to resolve these issues themselves.

The above standards for enforcing subpoenas have been met in the instant matter. First, the inquiry is within the authority of DOL. Section 504 of ERISA gives the Secretary of Labor broad authority to conduct investigations to determine whether any person has violated or is about to violate Title I of ERISA. 29 U.S.C. § 1134. Investigator Bindu A. George states in her declaration that the investigation was initiated to determine if any person has or is about to violate Title I or ERISA. George Decl. ¶ 2. Second, the request for production is definite. The documents, and the date and location that the documents were to be produced, are stated in the subpoenas. Finally, the documents are relevant to EBSA's investigation. The subpoenas requested documents pertaining to the establishment, contractual relationships, operation and finances of the Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Health and Welfare Benefit Plan and the Voluntary Employees' Beneficiary Association Trusts. George Decl. ¶ 3, 9.

The respondents argue that the plans involved are not covered by ERISA. In a subpoena enforcement action, however, an administrative agency is not required to demonstrate that the matter or entity it seeks to investigate "is covered by the enabling statute since the '(authority) to investigate the existence of violations . . .include(s) the authority to investigate coverage.'" Donovan v. Shaw, 668 F.3d 985, 989 (8th Cir. 1982) (citation omitted).[2]

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[2] The respondents argue that two federal courts have reviewed the relevant records in this case and have determined that the plans and trusts involved are not employer con-

The petitioner has made a prima facie showing of the statutory authority, legitimate purpose, and relevance. The burden shifts to the respondents to provide compelling reasons why the subpoena should not be enforced. Marshall v. Amalgamated Ins. Agency Services, Inc., 523 F. Supp. 231, 233 (N.D. Ill. 1981). See also United States v. Powell, 379 U.S. 48, 57-58 (1964). In a subpoena enforcement matter, a hearing on the merits of an investigation is not proper unless the respondents convince the Court that the agency is acting in bad faith or for an improper purpose. See United States v. Aero Mayflower Transit Co., 831 F.3d 1142, 1145-47.

The respondents have argued that the agency is acting in bad faith and for an improper purpose because the investigation is being driven by Sidney Charles Markets, Inc. ("SCM"), the respondents' adversary in ongoing litigation. The only evidence proffered by the respondents in support of this allegation is that SCM's counsel told respondents' counsel that he would "use the DOL" to get funds for his client. SCM's motivation is not relevant to the property of the DOL's investigation. Even assuming that the investigation was prompted by a compliant by SCM, that fact does not rise to the level of bad faith or improper purpose by the agency. See Securities and Exchange Commission v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 127 (3d Cir. 1981).

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trolled. The Court finds that the DOL is not estopped from challenging that conclusion, both because the DOL was not a party in the previous cases and because the courts in those cases were deciding motions to dismiss. See Schroeder v. Acceleration life Ins. Co. of Pennsylvania, 972 F.2d 41, 45 (3d Cir. 1992).

The Court, therefore, will quash the subpoena for the testimony and documents of Investigator Bindu George.

For the above reasons, the Court finds that the subpoenas are generally enforceable. The respondents argue that some of the requested information is protected by the attorney client privilege or is privileged private and/or sensitive health information. The Court will not resolve these issues until the parties have had a chance to negotiate the respondents' specific objections.

An appropriate Order follows.

APPENDIX J – SUR REPLY BY DOL TO RESPONSE, DATED JUNE 7, 2004

United States District Court for The
Eastern District of Pennsylvania

Elaine L. Chao, Secretary of Labor United States Department of Labor	:	
Petitioner,	:	
v.	:	Misc. Civ. Action No.
John J. Koresko, V., Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., and Koresko & Associates,	:	
Respondents.	:	

PETITIONER'S RESPONSE IN OPPOSITION TO LAWYER RESPONDENTS' AND ADMINISTRATIVE RESPONDENTS' RESPONSE TO THE DEPARTMENT OF LABOR'S PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO JOHN J. KORESKO, V., ESQUIRE; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC. AND THE LAW FIRM OF KORESKO & ASSOCIATES, P.C.

Petitioner, Secretary of Labor, United States Department of Labor, ("Secretary"), through her undersigned counsel, hereby files this Response in Opposition to "Lawyer Respondents' and Administrative Respondents' Response to the Department of Labor's Petition to Enforce Administrative Subpoena In An Investigation/Adversary Proceeding to John J. Koresko, V., Esquire; Regional Employers' Assurance leagues; Delaware Valley League; Penn-Mont Benefits Services, Inc. and the Law Firm of Koresko & Associates, P.C." (hereinafter, "Respondents' Response"). Respondents have provided no cause as to why they should not be ordered to produce the documents required by the subpoenas to the Employee Benefits Security Administration ("ESBA") of the Department of Labor.

The Secretary filed her Petition to Enforce Administrative Subpoenas issued to Respondents on April 19, 2004. On or about May 5, 2004, Respondents filed their Response and objections with other supporting documents.

A review of Respondents' Response and objections reveals the Respondents have obscured the real issues pending before this court. Given the voluminous and unfounded number of objections raised in Respondents' Response and the limited amount of time before the scheduled hearing in this matter, this memorandum addresses only several of the objections raised by Respondents. The Secretary however is prepared, if necessary, to address the remaining issues at the hearing. For all the following reasons, the Secretary's Petition to Enforce Administrative Subpoenas should be granted and the Respondents' Response and objections denied.

I. The Secretary Has Not Exceeded Her Statutory Authority

The Secretary has not exceeded her statutory authority; rather Respondents has misconstrued and distorted the application of Section of 504 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A § 1134. It is Section 504 which gives the Secretary of Labor broad authority to conduct investigations to determine whether any person has violated or is about to violate any provisions of Title I of ERISA or any regulation or order issued under that Title. Section 504 provides:

> INVESTIGATIVE AUTHORITY
>
> (a) The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this title or any regulation or order thereunder - -
>
> (1) to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this title, and
>
> (2) to enter such places, inspect such books and records and question such person as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of this title or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan.

The Secretary may make available to any person actually affected by any matter which is the subject of an investigation under this section, and to any department or agency of the United States, information concerning any matter which may be the subject of such investigation; except that any information obtained by the Secretary pursuant to section 6103(g) of the Internal Revenue Code of 1954 shall be made available only in accordance with the regulations prescribed by the Secretary of the Treasury.

(b) the Secretary may not under the authority of this section require any plan to submit to the Secretary any books or records of the plan more than once in any 12 month period, unless the Secretary has reasonable cause to believe there may exist a violation of this title or any regulation or order thereunder.

(c) For the purposes of any investigation provided for in this title, the provisions of Sections 9 and 10 (relating to the attendance of witness and the production of books, records, and documents) of the Federal Trade Commission Act (15 U.S.C. 49, 50) are hereby made applicable (without regard to any limitation in such sections respecting persons, partnerships, banks, or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him. To the extent he considers appropriate, the Secretary may delegate his investigative functions under this section with respect to insured banks acting as fiduci-

> aries of employee benefit plans to the appropriate Federal banking agency (as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)))

29 U.S.C. § 1134(a)(1),(a)(2), (b), (c).

Respondents' argument that section 504(a)(1) of ERSIA permits the Secretary to examine the reports, books and records of only those persons or businesses that are required to submit or report data to the Secretary is entirely without merit and a misapplication of the statute. (See Respondents' Response at pp.20-22) To the contrary, the statute neither states nor lends itself to such an interpretation. Nothing in the case law or legislative history of section 504 ERISA supports Respondents' position that they have no obligation to produce the subpoenaed documents simply because they may not have a statutory filing requirement. H.R. Rep. No. 93-533, (1993), *reprinted in* 1974 U.S.C.C.A.N. 4664; H.R.Rep.No. 93-807(1993), *reprinted in* 1974 U.S.C.C.A.N. 4852, 4872; H.R. Conf. Rep. No. 93-1280 (1993) *reprinted in* 1974 U.S.C.C.A.N. 5108, 5109. The statute allows the Department of Labor (DOL) to require the submission of reports, books and records. In addition, it allow the DOL to require the filing of data. The clause, "to be filed with the Secretary" does not modify "reports, books and records." Further, to the extent Respondents maintain that they are not subject to any statutory reporting requirements under ERISA, such argument must fail, since such a determination can not be made until after EBSA completes its investigation.

Similarly, Respondents' objection on the basis that section 504(a)(2) of ERISA requires "reasonable cause" to obtain

the subject documents in the instant matter is equally without merit. (See Respondents' Response at pp.20-22). A reading of section 504(a)(2) shows that a reasonable cause requirement applies when the Secretary seeks to enter places for the purpose of inspecting books and records and questioning persons on the premises. *See Donovan v. Shaw*, 668 F.2d 985, 990 (8th Cir. 1982) (Congress considered the limitations of sections 504(a)(2) and (b) and did not entertain any other proposals that would restrict the secretary's investigative powers by imposing a blanket requirement of establishing reasonable cause to investigate; pension fund was required to turn over documents to secretary.) The reasonable cause requirement also applies when the Secretary seeks to require a plan to submit its books and records to the Secretary more than once in any 12 month period. *Id., see also* 29 U.S.C. § 1134(b). To the extent any of the respondents are plans, the Secretary has not sought books and records from them more than one time in a 12 month period.

In the instant subpoena enforcement matter, the Secretary has neither entered nor sought to enter the premise of the Respondents to inspect its books or records or question persons. Rather, by subpoenaing Respondents to produce documents, EBSA has asked them to come forward and produce the required documents.

Finally, the Department of Labor may examine the documents of or interview anyone with knowledge that may be relevant to its investigation, including third parties who do not have obligations under ERISA. See, e.g. *United States v. Oncology Services Corporation,* 60 F.3d 1015, 1019 (3d Cir. 1995) (characterizing the investigative power of administrative agencies as the " ...power to get information from those

who best can give it and who are most interested in not doing so.")

Respondents' assertions that the Secretary exceeded her statutory authority because ERISA reporting requirements do not apply to them or because there has been no showing of reasonable cause to enter the premise of Respondents must fail given their distortion of section 504 of ERISA. Accordingly, the Secretary is within her statutory authority in issuing the subpoenas and the subpoenas should be enforced.

II. The Fiduciary Exception to the Attorney-Client Privilege Applies To the Subject Documents

Respondents' blanket assertion that every document requested by EBSA is privileged based on the attorney-client privilege simply because one of the Respondents, John Koresko, V., is an attorney and another, Koresko & Associates, is a law firm is unfounded. Based on Koresko's affidavit, it is clear that the law firm is acting as a plan administrator or providing administrator or support services for this plan or plans.

In addition, Respondents have not acknowledged the well established fiduciary exception to the attorney-client privilege, recognized in the ERISA case law. See, eg. *Koch v. Exide Corporation* 1989 WL 49515, *1 (E.D.Pa. 1989) (attorney-client privilege not applicable to protect documents relating to a challenge amendment of a pension plan). The fiduciary exception to the attorney-client privilege applies to ERISA cases when the client of the attorney was acting in a fiduciary capacity pursuant to ERISA. *In re Unisys Corporation Retiree Medical Benefits ERISA Litigation,* 1994 WL 6883 (E.D.Pa. 1994). Similarly, the attorney-client privilege

does not protect attorney communications relating to the administration of a pension plan from disclosure to plan participants or the DOL. *Koch v. Exide Corporation,* 1989 WL 49515, *1 (E.D. Pa. 1989). The Secretary of Labor in the instant ERISA subpoena enforcement action is also entitled to obtain documents under the fiduciary exception to the attorney-client privilege. *See, Donovan v. Fitzsimmons,* 90 F.R.D. 583 (N.D. Ill. 1981) (Court requiring pension plan to produce documents requested by Secretary of Labor that were otherwise subject to attorney-client and work produce privileges in an action alleging fiduciary misconduct under ERISA).

A review of the affidavit of Mr. Koresko, submitted by Respondents in support of their response and objections, indicates that Mr. Koresko, as well as Koresko and Associates, are both acting as fiduciaries and proving legal services to fiduciaries with respect to the subject welfare plan or plans. (See e.g. ¶¶ 5,11,12 of Affidavit of John J. Koresko, V., Esquire). As Mr. Koresko and the firm of Koresko and Associates are performing legal services for fiduciaries, they cannot assert the attorney-client privilege as the fiduciary exception applies.

Moreover, Mr. Koresko was not subpoenaed in his capacity as an attorney. He was subpoenaed by EBSA simply as a person who may possess documents relevant to EBSA's investigation. Likewise, Koresko and Associates were subpoenaed because it too may have documents relevant to EBSA's investigation.

Finally Respondents' blanket assertion that all documents are also protected as work product in anticipation of litiga-

tion must fail because not all such documents required by the subpoenas, including items like plan documents, summary plan descriptions, insurance and premium payments and other financial records, could have been created in anticipation of litigation as required for the privilege to apply. The attorney-client privilege and work-product doctrine do not protect the documents requested under the subpoenas. Consequently, the subpoenas should be enforced.

III. HIPPA Does Not Apply in the Instant Matter

To the extent Respondents claim that the Health Insurance Portability and Accountability Act (HIPPA) and privacy rights prevent them from disclosing documents required by the subpoenas, Respondents fail to recognize that HIPPA applies only to persons or entities covered by the regulation. *See* 45 C.F.R. parts 160 & 164. Covered entities may include health insurance issuers, health care clearinghouses, issuers of long-term care policies, group health plans and certain health care providers. *See* 45 C.F.R. part 160. Without additional information to the contrary, there is no basis at this point, to believe that any of the Respondents are covered persons or entities under HIPPA.

Moreover, even if Respondents were covered under HIPPA, HIPPA will not apply to the Secretary's request for the subject documents in the instant matter since EBSA is deemed a "health oversight agency" under the rule. Under HIPPA, a covered entity is permitted to disclose protected health information to a health oversight agency (ie. EBSA), when the information is necessary for overseeing compliance with health oversight regulatory functions. *See* 45 C.F.R. § 164.512(d). The Secretary is mainly seeking Plan docu-

ments and financial records to which HIPPA cannot possibly apply. Consequently, the documents requested under the subpoenas are not protected under HIPPA and should be produced to the Secretary.

IV. Conclusion

Respondents have not and cannot show cause as to why the subpoenas should not be enforced. Therefore, for all of the reasons stated herein as well in the Petitioner's Motion to Enforce Administrative Subpoenas and supporting documents, the Secretary submits that her Petition to Enforce Administrative Subpoenas should be granted and Respondents' Response and objections denied.

Respectfully submitted,

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APPENDIX K – RESPONSE TO PETITION TO ENFORCE, DATED MAY 5, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELAINE CHAO, SECRETARY (MAM) OF LABOR, U.S. DEPARTMENT OF LABOR, Petitioner	:Case No. :04:MC:00074
vs.	
JOHN J. KORESKO, V; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC.; and KORESKO & ASSOCIATES; Respondents	

LAWYER RESPONDENTS'[1] AND ADMINISTRATIVE RESPONDENTS'[2] RESPONSE TO THE DEPARTMENT OF LABOR'S PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA IN AN INVESITAGATION/ ADVERSARY PROCEEDING TO JOHN J. KORESKO, V, ESQUIRE; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC.; and THE LAW FIRM OF KORESKO & ASSOCIATES, P.C.

LAWYER RESPONDENTS and ADMINISTRATIVE RESPONDENTS (also DEPONENTS"), by their undersigned counsel, hereby respond to the Petition to Enforce Administrative Subpoenas ("PETITION") regarding the Subpoena In An Investigation/Adversary Proceeding dated February 4, 2004 (the "Subpoenas") served by the U.S. Department of Labor ("DOL"). The response and objections are as follows:

1. On or about early to mid-February 2004, the DOL attempted to serve the Subpoenas on the RESPON-

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[1] JOHN J. KORESKO, V. ("ATTORNEY KORESKO"); KORESKO & ASSOCIATES, P.C ("KAPC") (collectively "LAWYER RESPONDENTS")

[2] PENN-MONT BENEFIT SERVICES, INC. ("PENN-MONT"); REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES BENEFICIARY ASSOCIATION TRUST ("REAL VEBA trust"); LEAGUE ("DVL") (collectively "ADMINISTRATIVE RESPONDENTS")

DENTS for a series of depositions scheduled on March 9, 2004. (Miller Aff. ¶ 12 & Ex. "A").[3] The Miller Affidavit is being filed herewith.

2. The DOL neglected to follow the process as mandated by the Federal Rules of Civil Procedure.
3. On or about March 8, 2004 RESPONDENTS served written Objections to the Subpoenas. ("Objections"). (Miller Aff. ¶ 16 & Ex. "B").
4. The Objections referenced various objections including for each Respondent/Deponent:

   The DOL subpoena process is based by statute on the FTC process. These process are governed by the Federal Rules which DOL has violated in this instance.

   The information requested by DOL is overbroad an unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

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[3] The DOL subpoenas address the Delaware Valley League and the Regional Employers' Assurance League. Neither of these constitutes a welfare benefit plan or trust. Nor are they subject to ERISA. These entities are unincorporated associations of employers who came together to participate in a program of benefits offered to their employees in cooperation with their association. DOL's motion should be denied outright for this technical violation, as DOL is without authority to investigate either League. As DOL may assert that it intended to serve a benefits plan and trust, we submit the remainder of this response. However, on the basis of this technical blunder alone, the instant motion should be denied (and the subpoenas quashed) for failure to name a proper party and DOL's error in acting outside the scope of its investigation authority.

DEPONENT has previously responded to similar DOL requests as to make certain request duplicative. DEPONENT objects based on attorney-client privi lege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.

*The DOL request for documents and information is counter to the DOL's position on multiple employer trusts ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein.* Gruber v. Hubbard Bert Karle Weber, Inc., *159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A. Oct. 31, 1996));* MD Physicians & Associates Inc. v. State Board of Insurance. *957 F.2d 178 (5th Cir. 1992) (Amicus Curiae-U.S. Secretary Of Labor),* Taggart Corp., et al. v. Life & Health Benefits Admin. Inc., *et al., 617 F.2d 1208, 1210 (5th Cir. 1980);* Donovan v. Dillingham, *688 F.2d 1367 (11th Cir. 1982);* Finderne Management Company, Inc. v. Barrett, *355 N.J.Super 170, 809 A.2d 842*

(N.J.Super.App.Div. 11/20/2002) (Amicus Curiae United States Department of Labor).[4]

The DOL is trying to do discovery for an on-going litigation styled REAL VEBA, et al. v. Sidney Charles Markets, et al., (E.D. Pa). In the case of a live judicial controversy, KORESKO as attorney of record and the other DEPONENTS claim attorney-client privilege and litigation privilege as to those files.

ERISA provides that any administrative subpoena has to be related to information that would be reportable to DOL. First, REAL VEBA is not a MEWA. Second, there is an administrative exemption for insurance-only plans. Under sec. 504 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. REAL VEBA is not a MEWA, according to DOL, so no Form 5500 need be filed. Life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 504.

DEPONENT objects as Sec. 504 further states that DOL can make any information public and such public disclosure conflicts with privacy legislation and

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[4] Furthermore, in this case, two federal district courts have reviewed the plan and trust documents. Those courts determined that DVL and REAL VEBA are not employee or employer controlled. Ex. 1 and Ex. 2.

any other rule of discovery protection. The ERISA section gives DOL the authority to republish all information that DOL receives. Such authority would breach privilege and work product protections. First, much of the info they request is tax return information, which DEPONENTS are barred from disclosing by the Internal Revenue Code. Additionally, DOL request confidential business records, which are protectable from disclosure. The law firm currently possesses certain of the requested records, and they will not be disclosed pursuant to attorney-client privilege. As to the insurance contracts, in all REAL VEBA participation agreements, DEPONENTS are listed as attorney-in-fact to which DEPONENTS assert privilege. The life insurance records contain info protected by privacy legislation and attorney-client privilege.

The current DOL rules for re-publication of information would also result in a violation of the HIPPA privacy rules.

The DOL has not met its burden regarding requesting of information by establishing that there is MEWA that DOL may regulate. DOL must first satisfy a preliminary test to determine whether there is any employer or employee control. DEPONENTS already provided that information in a previous response to DOL's investigator.

In the absence of authority, and their previous rulings on organizations similar to REAL VEBA, DEPONENTS are absolutely justified in maintaining that DOL has no jurisdiction. DOL has admitted such and

is estopped by such position. DOL's previous position implicates judicial estoppel.

Notice 95-34, issued by the Internal Revenue Service in 1995, was a clear statement of intent to litigate the issues included in the information sought by the DOL. DEPONENT claims the files as work product on the basis that all information requested was assembled under the threat of and in anticipation of litigation, as well.

The Subpoena violates the DEPONENT's rights, including: the right to privacy under the United States Constitution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to confront accusers as DOL has refused to provided any information on the accusations of accusers; and a right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM case.

Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

DOL has failed to provide a witness fee pursuant to the Federal Rules.

DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not permitted without some probable cause. Such request in and of itself would cost DEPONENT thousands of dollars in time and actual reproduction costs, and is therefore clearly unreasonable in the absence of a jurisdictional predicate.

DEPONENT, as litigant or counsel in on-going litigation, has the right to find out if DOL is being used by Sidney Charles Markets, as that goes to the "rightfulness" of the subpoena. If the DOL is interfering in litigation, DEPONENT has the right and authority to fight the subpoena simply on that basis, and assert that the procedures of the Court vested with jurisdiction in that matter and the discovery provisions of the Federal Rules take precedence.

Based upon the totality of the objections to this subpoena, DEPONENT believes that this administrative subpoena has been issued with improper purpose.

Based upon the totality of the objections to this subpoena, DEPONENT believes there is no probable cause to suspect a violation of ERISA and demands further proof.

5. Although under no obligation to do because of the previous objections, RESPONDENTS agreed to produce certain documents, namely trust and plan documents, for the DOL to review that would enable the DOL to make its assessment that the REAL VEBA trust and the DVL trust were not employer controlled MET and thus not subject to the DOL regulation or investigation.
6. On or about April 6, 2004, RESPONDENTS produced documents bate-stamped PMDOL0004 through PMDOL0148 ("PRODUCED DOCUMENTS") under a cover letter stating:

*In accordance with our prior stance that NO DOCUMENTS ARE REQUIRED TO BE PRODUCED but the willingness to cooperate, although not required by law, we therefore are producing the attached documents that are public documents filed in the Eastern District of Pennsylvania. We are not willing to allow you to review our full files; accordingly I have pulled certain documents that are public. A review of the documents clearly shows the type of plan and the statutes and furthers that these subpoenas are counter to the DOL's position on multiple employer trusts ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provision exercised herein. Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A. Oct. 31, 1996)); MD Physicians & Associates Inc. v. State Board of Insurance, 957 F.2d 178 (5th Cir. 1992)(Amicus Curiae-U.S. Secretary of Labor), Taggart Corp., et al. v. Life & Health Benefits Admin. Inc., et al., 617 F.2d 1208, 1210 (5th Cir. 1980); Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982); Finderne Management Company, Inc. v. Barrett, 355 N.J. Super. 170, 809 A.2d 842 (N.J. Super.App.Div. 11/20/2002) (Amicus Curiae United States Department of Labor)....*

You have not responded to THE OBJECTIONS and have refused to provide any authority differing to THE OBJECTIONS.

As stated in THE OBJECTIONS, the DOL has not met its burden regarding requesting of information by establishing that there is a MEWA that DOL may regulate. DOL must first satisfy a preliminary test to determine whether there is any employer or employee control.....

In accordance with federal practice and as stated in the Subpoenas In An Investigation/Adversary Proceedign to PENN-MONT BENEFIT SERVICES, INC.; REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUST; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; JOHN J. KORESKO, V; DELAWARE VALLEY LEAGUE; and KORESKO & ASSOCIATES Dated February 4, 2004; the proper procedure is to produce the documents OR the individual as requested in the subpoena. We are currently under no requirement to do either as the subpoenas are defective. Accordingly no privilege log is required at this time. Our current selection SHOULD you revise you subpoenas to conform with federal practice would be to produce the individuals.
(Miller Aff. Ex. "B").

7. Although the Petitioner and the Respondents spoke regarding the production of the documents in Exhibit "B", Petitioner refused to address the items raised in the Objections.

8. After receipt of the PRODUCED DOCUMENTS, the DOL did not contact the RESPONDENTS to meet and confer about the OBJECTIONS and PRODUCED DOCUMENTS, but instead on or about April 16, 2004 filed this Petition to Enforce Administrative Subpoenas.
9. Petitioners' failure to "meet and confer" prior to filing the instant petition is a violation of Local Rule 26.1.
10. In the Petition, the DOL refuses to address the Objections and in violation of Local Rule 26.1, fails to file the OBJECTIONS and certify that attempts were made to resolve the dispute.
11. The Petition exceeds the DOL's statutory authority to enforce the Subpoenas.
12. Two federal district courts have: 1) reviewed the subject DVL and REAL VEBA plan and trust documents (as also produced to the DOL in the PRODUCED DOCUMENTS) and 2) made findings that DVL and REAL VEBA are not employee or employer controlled plan/trusts. (Ex. "1" and "2"). Accordingly, the Petitioner is estopped from arguing that the DVL and REAL VEBA are employer or employee controlled METS that it has authority to investigate.
13. The DOL fails to make a prima facie showing of statutory purpose, legitimate purpose, and reasonable relevance.
14. As discussed in the accompanying Memorandum of Law,[5] the Objections raised are meritorious and as the

[5] In addition to the accompanying memorandum of law, the Respondents rely upon the affidavit of John J. Koresko, V, Esq which affidavit is being filed herewith.

15. Petitioner has failed to comply with the Federal Rules Civil Procedure and specifically Local Rule 26.1, this Court should DENY the Petition.

WHEREFORE, RESPONDENTS respectfully request that this Court DENY the Petition to Enforce Administrative Subpoenas.

Respectfully submitted,

Dated: May 5, 2004

VIM-1712

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELAINE CHAO, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, Petitioner	:Case No. 04:MC:00074 (MAM)
vs.	
JOHN J. KORESKO, V; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE PENN-MONT BENEFIT SERVICES, INC.; and KORESKO & ASSOCIATES; Respondents	

LAWYER RESPONDENTS'[1] AND ADMINISTRATIVE RESPONDENTS'[2] MEMORANDUM OF LAW IN RESPONSE TO THE DEPARTMENT OF LABOR'S PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO JOHN J. KORESKO, V, ESQUIRE; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC; and THE LAW FIRM OF KORESKO & ASSOCIATES, P.C.

I. INTRODUCTION

The DOL is petitioning this Court to enforce subpoenas, that: 1) The DOL subpoenas address the Delaware Valley League and the Regional Employers' Assurance League. Neither of these constitutes a welfare benefit plan or trust. Nor are they subject to ERISA. These entities are unincorporated associations of employers who came together to participate in a program of benefits offered to their employees in cooperation with their association. DOL's petition should be denied outright for this technical violation, as DOL is without authority to investigate either League. As DOL may

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[1] JOHN J. KORESKO, V ("ATTORNEY KORESKO"); KORESKO & ASSOCIATES, P.C. ("KAPC") (collectively "LAWYER RESPONDENTS")

[2] PENNMONT BENEFIT SERVICES, INC. ("PENN-MONT"); REGIONAL EMPLOYERS' ASSURANCE LEAGUES and DELAWARE VALLEY LEAGUE ("DVL")(collectively "ADMINISTRATIVE RESPONDENTS")

assert that it intended to serve a benefits plan and trust, we submit the remainder of this response. However, on the basis of this technical blunder alone, the instant petition should be denied for failure to name a proper party and DOL's error in acting outside the scope of its investigatory authority; 2) on their face exceed the DOL's jurisdiction and statutory authority; 3) contain broad requests for irrelevant and/or privileged documents, such as all documents concerning life insurance policies, which include personal applications containing the most sensitive of health information and disclosures of diseases, alcoholism, herpes, HIV status, and treatment/hospitalization for such things as mental/emotional disorders; and 4) are directed to the welfare benefit plans' and trust' attorneys, including litigation files and client files, that the IRS could not compel. The Respondents filed numerous Objections and provided documents clearly showing that the subject plans were not regulated by the DOL according to the DOL's precedent and own internal procedures. The DOL baldly fails to attach or even address the Objections in its Petition. The DOL's flagrant disregard for procedure is so blatant that after documents were voluntarily produced demonstrating the DOL's lack of jurisdiction, the DOL did not even attempt to meet and confer about the response but instead rushed to this Court.

In this Memorandum, Respondents set forth the reasons that this Court should not enforce the administrative subpoenas. First, the DOL's authority may be broad but it still must adhere to its own procedures and statutory authority, which the DOL has failed to do in this instance. Secondly, the subject plans are multiple employer trusts, not controlled by employees or the employer, which the DOL admits fall out-

side the scope of its authority. Thirdly, the PRODUCED DOCUMENTS clearly show and a New Jersey court has determined from these same documents that the subject plans and trusts are not employer or employer controlled.[3] Fourthly, active litigation is before this Court and the requests for information, about DVL where the only employer in that plan is the subject litigant, demonstrates that the requests are tied to the litigation.[4] Fifthly, the requests are irrelevant, overbroad and burdensome. Lastly, the items requested concern certain sensitive and personal areas, including a person's health, a person's financial condition, and the relationship with his/her attorney. Clear precedent shows that the information, within the scope of the subpoena requests, is covered by HIPPA and the attorney-client privilege as to preclude production.

This is merely a fishing expedition by the DOL into areas where it has no jurisdiction and for documents it clearly has no right or need to review. For all these reasons and as more fully set forth in this Memorandum, the Court should respectfully deny the Petition to Enforce Administrative Subpoenas.

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[3] If two federal court judges could determine the lack of authority or control by an employee or employer by the PRODUCED DOCUMENTS, then the DOL should be able to make the same determination.

[4] Pursuant to the DOL's own statutory authority, the DOL could intervene in that case.

II. STATEMENT OF THE FACTS

Respondents, by their undersigned counsel, allege the following facts and affidavits[5] in support. The Sidney Charles Markets, Inc. ("SCM") plan history and litigation must be set forth to explain the involvement and knowledge of the parties and how this action relates to the active litigation before this Court.

A. PLAN HISTORY OF SIDNEY CHARLES MARKETS, THE ONLY EMPLOYER IN THE DELAWARE VALLEY LEAGUE

Prior to 1994, SCM adopted a welfare benefit Plan under the Southern California Retail Merchants League VEBA Trust ("SoCal VEBA"). (Bonney Aff., Ex. "A"). On or about December 31, 1993, SCM transferred the SoCal VEBA, including the underlying life insurance policies, and executed Adoption Agreements to join the DVL (Bonney Aff., Ex. "C") and adopted the League's VEBA (Bonney Aff., Ex. "D") and Trust (Bonney Aff., Ex. "F"). The Plan and Trust are collectively referred to as the "VEBA". The IRS recognized the League VEBA as an exempt organization pursuant to 26 U.S.C. § 501 (c)(9) on March 24, 1994 (Bonney Aff., Ex. "E"). Penn-Mont provides administrative services relating to VEBA's including the VEBA adopted by SCM. (Bonney Aff., Ex. "C", at 1).

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[5] The Affidavit of Jeanne Bonney was filed with this Court in the underlying SCM actions and herein. The same Affidavit and exhibits were produced to the Petitioner. The Affidavit is attached hereto as Exhibit "B".

On July 1, 1996, CoreStates, N.A. agreed to become Trustee of the REAL VEBA[6] (Bonney Aff., Ex. "G"). Pursuant to section 1.1 of a new Amended and Restated Master Trust Agreement, employers who wanted to adopt the REAL VEBA were required to execute a certain Consent to Become Party to Trust Agreement. (the "Consent") (Bonney Aff., Ex. "G" at 14). By 1997, every employer who previously adopted the League VEBA, except SCM, executed the Consent. (Bonney Aff., Ex. "T").

On December 10, 1997, Penn-Mont notified Zimmerman and SCM by letter of "certain requirements for continued participation." (Bonney Aff. Ex. "H"). Specifically, SCM was asked to 1) provide an updated Employee Census for the year 1997, 2) execute a Consent, and 3) complete Participation Agreements that had to be signed by each employee. On February 12, 1998, July 20, 1998, August 6, 1998 and August 19, 1998, the same forms were again sent to Zimmerman and SCM; these forms were neither signed nor returned. (Bonney Aff., Ex. "N"). On August 19, 1998, a detailed letter was sent to Zimmerman and SCM repeating participation requirements and once again the Participation Agreements for each employee and the Consent were enclosed for completion; again, these forms were neither signed nor returned. (Id.). Because of SCM's refusal to execute the Consent Agreement, SCM never became an employer participating in the REAL VEBA plan and trust. (Bonney Aff., Ex. "G", sec. 1.1). At a period commencing prior to January 1, 2000, SCM was the sole remaining em-

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[6] REAL VEBA was not named in the subpoena or petition to enforce.

ployer in the DVL but was not participating employer in the REAL VEBA plan and trust.

Accordingly, due to its own failure to execute required documents, from December 10, 1997, employees of SCM could not derive benefits from REAL VEBA. The SCM employees were ineligible to receive benefits from REAL VEBA as the SCM employees had not executed the Employee Participation Agreements.[7] Additionally, SCM had never agreed to become a member of the REAL, and therefore, its Employees never became participants in REAL VEBA.[8]

In July 1998, Zimmerman and Barry Shiffman contacted the Penn-Mont offices to inform Penn-Mont that a SCM em-

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[7] Section 3.07 of the VEBA Plan Document (Bonney Aff., Ex "D") in force during all relevant periods states as follows:

Voluntary Participation-.....Each eligible employee shal complete an Employee Participation Agreement on such forms as may be provided by the Plan Administrator, in order to participate

[8] Section 3.01 (e) of the VEBA Plan Document (Bonney Aff., Ex "D") in force during all relevant periods states as follows:

Duration of Participation: An Employee who otherwise meets the requirements for eligibility and participation contained herein shall be a participant in this plan only during the period the Employer is a member of the League. Upon termination of the Employer's League membership, where voluntary or involuntary the Employee shall have no further right to the benefits hereunder including without limitation, those benefits for which claims have been made but not yet paid on the date League membership terminates.

ployee, Jean Waitt, had died and that she had embezzled a large sum of money form SCM. Zimmerman demanded any insurance money payable on Ms. Waitt's life. (Bonney Aff., Exs. "J", "K" and "L"). PM reminded Zimmerman and Shiffman that such a payment to a creditor would violate the anti-alienation clause in the Plan and Trust documents (Bonney Aff., Ex. "D", sec. 10.04; Ex. "F", sec. 9.03; Ex. "G", sec. 12.8), and any such payment would violate the Plan's "bad boy" clause which disqualifies employees from benefits if they engaged in embezzlement. (Bonney Aff., Ex. "K").[9] Zimmerman became enraged that Penn-Mont would not pay the Jean Waitt death benefit to him, and he then turned the matter over to his lawyers, Mr. Osborne and Mr. Kreizman. (Bonney Aff., Exs. "L," and "Z"). On July 8, 1998, Mr. Os-

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[9] At all relevant times, the VEBA Plan (Bonney Aff., Ex. "D", at 10) contained a disqualification clause, known as a "bad boy" clause, as follows:

General Limitation on Benefit Payment-Notwithstanding any provisions of this Plan and Trust, a participant who has less than ten (10) years of participation shall forfeit any benefit payable hereunder if it is determined by the Plan Administrator that he has engaged in a disqualifying act with respect to the Employer, Employees, or to the League. A Participant shall be deemed to have engaged in a disqualifying act if he is determined by the Plan Administrator to have: (1) been guilty of committing theft, fraud, or embezzlement with respect to the Employer; or (2) committed any criminal or malicious act [not rising to the level of a crime] which damages the person or property of the Employer, Employees or the League. The judgment of the Plan Administrator as to whether a Participant has committed a disqualifying act shall be final, unless without evidence to support such judgment.

borne wrote and reiterated that SCM had claims against the Estate of Jean Waitt. (Bonney Aff., Ex. "J").

On July 21, 1998, John Koresko, Esquire, informed Mr. Osborne that any payment to SCM out of death benefits for Jean Waitt would be a breach of the anti-alienation clause in the VEBA documents. Further, Mr. Koresko communicated that because Zimmerman had failed to obtain Participation Agreements from his employees and that because specifically Jean Waitt had failed to execute a Participation Agreement, Jean Waitt was not a participant pursuant to the exclusion in section 3.07 of the Plan. Finally, Mr. Koresko described the Plan's "bad boy" clause, which disqualified dishonest employees from benefits. Mr. Koresko offered to refund any premiums paid on behalf of the policies held by PPT on behalf of Jean Waitt pursuant to the mistake of fact provisions in the Plan document. (Bonney Aff., Ex. "K").

On or about May 4, 2000, Mr. Kreizman filed a Complaint, alleging almost identical claims (to the crossclaims asserted by SCM in the E.D. Pa. action), in the United States District Court, District of New Jersey styled Sidney Charles Markets, Inc., Michael Zimmerman, and Craig Waitt v Penn-Mont Benefit Services, Lawrence Koresko , and Regional Employers Assurance League; Case No. 00-213(("New Jersey Action") wherein Defendants SCM and Zimmerman sought the return of SCM's contributions to the VEBA plan, an accounting, and a constructive trust preventing the use of any plan funds for the payment of legal fees (J. Hutton Slip. Op, Ex. "2", at p. 4) Defendant Waitt also sought payment of his late wife's death benefits. (Id.). On or about March 28, 2002, Judge Bassler dismissed the amended complaint in the New Jersey Action holding that:

1) SCM as an employer acting on behalf of its employees, lacked standing specifically, that neither SCM nor Zimmerman cold be a fiduciary[10] as the Plan and Trust were not employer or employee controlled, noting that "Here it is indisputable that authority and/or control is vested exclusively in PennMont as plan administrator pursuant to section 6 of the VEBA plan"; 2) other Defendants (Zimmerman, Waitt, Estate of Jean Waitt) had failed to exhaust their administrative relief as required by ERISA; and 3) all the claims for benefits and enforcement of rights under the Plan were preempted by ERISA. (J. Bassler Slip Op., Ex. "1", at 6).

On or about August 15, 2001, Penn-Mont filed a complaint in the Eastern District of Pennsylvania. In Counts I through X, Penn-Mont seeks declaratory relief essentially stating that the Plan provisions are valid and that they have not breached the VEBA Plan. In Counts XI through XII; Penn-Mont seeks monetary damages from Defendant SCM on theories of contract and breach of fiduciary duty. (J. Hutton Slip Op., Ex. "2", at 4-5).

On or about May 28, 2002, SCM and the SCM employees filed Counterclaims "identical to the claims Defendants raised in their complaint as Plaintiffs in the New Jersey action." (J. Hutton Slip Op., Ex. "2"). The Counterclaims added plaintiffs Kelvin Burseth, Donna Arvelo, Gerrard

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[10] "Fiduciary" status will be found when a peson is vested with discretionary authority or control with respect to a plan's management, asset distribution or administration, or renders investment advice. (J. Bassler, Slip Op. at 11;29 U.S.C. Sec. 1002 (21)(A)).

Raffa, and Rigaud Destinoble (collectively "SCM employees"). On January 29, 2003, this Court, finding that the issues presented were identical to the New Jersey action and that Judge Bassler's Opinion was persuasive, granted the Motion to Dismiss and dismissed the Counterclaims.

On or about February 3, 2003, SCM and the SCM employees attempted to refile almost identical counterclaims. After discussion with counsel and threatened Rule 11 sanctions, SCM and the SCM employees' counsel filed a Motion to Withdraw Amended Counterclaims. On or about April 4, 2003, SCM and the SCM employees filed a Motion to Amend Counterclaims with an accompanying brief in support. On or about April, 28, 2003, Plaintiffs filed a Memorandum in Opposition to Defendants' Motion to Amend Counterclaims. On or about September 24, 2003, the Court denied the Motion to File Amended Counterclaims and ordered the employees of SCM and SCM to follow the administrative process as outlined by the Plan Document. (J Hutton Slip Op., Ex. "3"). The administrative process has been progressing in the SCM Eastern District of Pennsylvania action. (Miller Aff. ¶ 5). This matter is still pending and is an active case before Judge Hutton.

B. PROCEDURAL HISTORY OF THIS ACTION

In the summer of 2003, the DOL requested information regarding the REAL VEBA. Attorney Koresko, as counsel to the plan, sent two letters and gave the DOL the information to which the DOL was entitled. (*See* Korekso Aff.).

On or about early to mid-February 2004, the DOL attempted to serve the subpoenas on the RESPONDENTS for a series of depositions of Attorney Koresko, the law firm

KAPC, DVL, REAL VEBA, and Penn-Mont. The cover letter stated: "Accompanying this letter is a subpoena duces tecum towards you requiring the production of certain specified documents. These documents are necessary and relevant to the above-referenced investigation....Your personal appearance pursuant to this subpoena will not be required, provided the documents as required in the subpoena are produced." (gov. Ex. "A").

The DOL subpoenas address the Delaware Valley League and the Regional Employers' Assurance League. Neither of these constitutes a welfare benefit plan or trust. Nor are they subject to ERISA. These entities are unincorporated associations of employers who came together to participate in a program of benefits offered to their employees in cooperation with their association. DOL's petition should be denied outright for this technical violation, as DOL is without authority to investigate either League. As DOL may assert that it intended to serve a benefits plan and trust, we submit the remainder of this response. However, on the basis of this technical blunder alone, the instant petition should be denied for failure to name a proper party and DOL's error in acting outside the scope of its investigatory authority.

The attachment to the subpoena contained broad requests including: all documents concerning Penn-Mont, DVL, and REAL; all bank records and documents concerning all expenses; all documents relating to the identity of employers and employees participating in the Plans; all documents concerning the insurance policies held by the Plans; all documents relating to the sales, marketing, advertising, and promotion of the plan and the underlying policies; and all

documents concerning service providers, specifically including legal providers. (Gov. Ex. "A").

On or about March 8, 2004, RESPONDENTS served written objections to the subpoenas. ("Objections") (Miller Aff. ¶ 16 and Ex. "A"). The DOL neglected to follow the process as mandated by its own internal procedures and the Federal Rules of Civil Procedure, including but not limited to: 1) not providing witness fees; 2) failing to address the Objections; and 3) requesting information outside their investigation authority and jurisdiction. The Objections referenced various objections including for each Respondent/Deponent:

> The DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rules which DOL has violated in this instance.
>
> The information requested by DOL is overbroad and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.
>
> DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.
>
> DEPONENT objects based on attorney-client privilege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.
>
> The DOL request for documents and information is counter to the DOL's position on multiple employer trusts ("MET") that has been restated numerous times since

1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A. Oct. 31, 1996)); MD Physicians & Associates Inc. v. State Board of Insurance, 957 F.2d 178 (5th Cir. 1992) (Amicus Curiae-U.S. Secretary of Labor), Taggart Corp., et al. v. Life & Health Benefits Admin. Inc., et al., 617 F.2d 1208, 1210 (5th Cir. 1980); Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982): Finderne Management Company, Inc. v. Barrett, 355 N.J.Super. 170, 809 A.2d 842 (N.J.Super.App.Div. 11/20/2002) (Amicus Curiae United States Department of Labor).[11]

The DOL is trying to do discovery for an on-going litigation styled REAL VEBA, et al. v. Sidney Charles Markets, et al., (E.D. Pa). In the case of a live judicial controversy, KORESKO as attorney of record and the other DEPONENTS claim attorney-client privilege and litigation privilege as to those files.

ERISA provides that any administrative subpoena has to be related to information that would be reportable to

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[11] Furthermore, in this case, two federal district courts have reviewed the plan and trust documents. The Courts have determined that DVL VEBA and REAL VEBA are not employee or employer controlled.

DOL. None of the information DOL has subpoenaed is reportable to DOL. First, REAL VEBA is not a MEWA. Second, there is an administrative exemption for insurance-only plans. Under sec. 504 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. REAL VEBA is not a MEWA, according to DOL, so no Form 5500 report need to be filed. Life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 504.

DEPONENT objects as Sec. 504 further states that DOL can make any information public and such public disclosure conflicts with privacy legislation and any other rule of discovery protection. The ERISA section gives DOL the authority to re-publish all information that DOL receives. Such authority would breach privilege and work product protections. First, much of the info they request is tax return information, which DEPONENTS are barred from disclosing by the Internal Revenue Code. Additionally, DOL requests confidential business records, which are protectable from disclosure. The law firm currently possesses certain of the requested records, and they will not be disclosed pursuant to attorney-client privilege. As to the insurance contracts, in all REAL VEBA participation agreements, DEPONENTS are listed as attorney-in-fact to which DEPONENTS assert privilege. The life insurance records contain info protected by privacy legislation and attorney client privilege.

The current DOL rules for re-publication of information would also result in a violation of the HIPPA privacy rules.

The DOL has not met its burden regarding requesting of information by establishing that there is a MEWA that DOL may regulate. DOL must first satisfy a preliminary test to determine whether there is any employer or employee control. DEPONENTS already provided that information in a previous response to DOL's invstigator.

In the absence of authority, and their previous rulings on organizations similar to REAL VEBA, DEPONENTS are absolutely justified in maintaining that DOL has no jurisdiction. DOL has admitted such and is estopped by such position. DOL's previous position implicates judicial estoppel.

Notice 95-34, issued by the Internal Revenue Service in 1995, was a clear statement of intent to litigate the issues included in the information sought by the DOL. DEPONENT claims the files as work product on the basis that all information requested was assembled under the threat of and in anticipation of litigation, as well.

The Subpoena violates the DEPONENT's rights, including: the right to privacy under the United States Constitution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to confront accusers as DOL has refused to provide any information on the accusations or accusers; and a right to prevent DOL has refused to provide any information on the accusations or accusers; and a right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM

case. Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

DOL has failed to provide a witness fee pursuant to the Federal Rules.

DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not permitted without some probable cause. Such request in and of itself would cost DEPONENT thousands of dollars in time and actual reproduction costs, and is therefore clearly unreasonable in the absence of a jurisdictional predicate.

DEPONENT, as litigant or counsel in on-going litigation, has the right to find out if DOL is being used by Sidney Charles Markets, as that goes to the "rightfulness" of the subpoena. If the DOL is interfering in litigation, DEPONENT has the right and authority to fight the subpoena simply on that basis, and assert that the procedures of the Court vested with jurisdiction in that matter and the discovery provisions of the Federal Rules take precedence.

Based upon the totality of the objections to this subpoena DEPONENT believes that this administrative subpoena has been issued with improper purpose.

Based upon the totality of the objections to this subpoena DEPONENT believes there is no probable cause to suspect a violation of ERISA and demands further proof.

In the Objections, the RESPONDENTS did agree to produce certain records that were of a public nature, from the SCM litigation, to which SCM and its employees had waived

their privileges. The subpoenas that included requests for information on the DVL waived their privileges. The subpoenas that included requests for information on the DVL starting in the year 2000, when the ONLY employer still connected with the DVL for that period was SCM. The subpoenas were clearly tied to complaints filed with the DOL by SCM or one of the SCM employees.

In discussions regarding the SCM litigation, DOL attorney Natalie Appetta requested access to all files, including legal files held by Anderson Kill & Olick. Although under no obligation to do so because of the previous objections, RESPONDENTS agreed to produce trust and plan documents for the DOL to review so that the DOL could make its assessment that the REAL VEBA trust and the DVL trust were not employer controlled MET and thus not subject to the DOL regulation or investigation.

At no time in the conversation with DOL personnel did the DOL address the Objections. On or about April 6, 2004, RESPONDENTS produced documents bate-stamped PMDOL00004 through PMDOL0148 ("PRODUCED DOCUMENTS") under a cover letter stating:

> In accordance with our prior stance that NO DOCUMENTS ARE REQUIRED TO BE PRODUCED but the willingness to cooperate, although not required by law, we therefore are producing the attached documents that are public documents filed in the Eastern District of Pennsylvania. We are not willing to allow you to review our full files; accordingly I have pulled certain documents that are public. A review of the documents clearly shows the type of plan and the statutes and furthers that

these subpoenas are counter to the DOL's position on multiple employer trusts ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A. Oct. 31, 1996)); MD Physicians & Associates Inc. v. State Board of Insurance, 957 F.2d 178 (5th Cir 1992) (Amicus Curiae –U.S. Secretary of Labor) Taggart Corp., et. Al. v. Life & Health Benefits Admin Inc., et. al., 617 F.2d 1208, 1210 (5th Cir. 1980); Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) Finderne Management Company, Inc. v. Barrett, 355 N.J Super. 170, 809 A.2d 842 (N.J. Super. App. Div 11/20/2002) (Amicus Curiae United States Departmen of Labor).....

You have not responded to THE OBJECTIONS and have refused to provide any authority differing to THE OBJECTIONS.

As stated in THE OBJECTIONS, the DOL has not me its burden regarding requesting of information by estab lishing that there is a MEWA that DOL may regulate DOL must first satisfy a preliminary test to determin whether there is any employer or employee control.....

In accordance with federal practice and as stated in th Subpoenas In An Investigation/Adversary Proceeding to

PENNMONT BENEFIT SERVICES, INC,; REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUST; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; JOHN J. KORESKO, V; DELAWARE VALLEY LEAGUE; and KORESKO & ASSOCIATES Dated February 4, 2004; the proper procedure is to produce the documents OR the individual as requested in the subpoena. We are currently under no requirement to do either as the subpoenas are defective. Accordingly no privilege log is required at this time. Our current selection SHOULD you revise your subpoenas to conform with federal practice would be to produce the individuals.

(Ex. "B").

After receipt of the PRODUCED DOCUMENTS, the DOL did not contact the RESPONDENTS to meet and confer about the OBJECTIONS and PRODUCED DOCUMENTS but instead on or about April 16, 2004, filed this Petition to Enforce Administrative Subpoenas. In the Petition, the DOL refuses to address the Objections and in violation of Local Rule 26.1, fails to attach the Objections and certify that attempts were made to resolve the dispute.

III. ARGUMENT

A. Administrative Actions Generally

This Court is not bound by an administrative agency's classification of its own action. *CBS, Inc. v. United States*, 316 U.S. 407 (1942); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983); *Brown Express*, 607 F.2d at 700; *Lewis-Mota v. Secretary of Labor*, 469 F.2d

478, 481-82 (2d Cir. 1972); *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740, 743-45 (3d Cir. 1969). The reason for this standard is clear. Although the courts must recognize broad administrative discretion whether to implement procedures above the minima required by Congress, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-49 (1978), an agency cannot outflank either the strictures of its enabling legislation or the Administrative Procedures Act's[12] rulemaking framework by definitional fiat. See *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20 (1979); *Zuber v. Allen*, 396 U.S. 168, 193 (1969); *NLRB v. Brown*, 380 U.S 278, 291 (1965). A paisley ribbon will not make up for damaged goods; the substance, not the label, is determinative. See *Western Coal Traffic League v. United States*, 694 F.2d 378, 392 & n. 61 (5th Cir. 1982), vacated in part en banc, 719 F.2d 772 (5th Cir. 1983), cert. denied, 466 U.S. 953 (1984); *American Trucking Associations, Inc. v. ICC*, 659 F.2d 452, 462-64 (5th Cir. 1981), cert. denied., 460 U.S. 1022 (1983); *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980).

B. Administrative Subpoenas Have Limits that the DOL Misstates and Exceeds.

The DOL would have this Court believe that its function is to rubber stamp a Petition to Enforce Administrative Sub-

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[12] Actions of the Secretary of Labor against persons allegedly related to ERISA plans are subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C.A. § 701 (a)(2). See *Huffer v. Herman*, 168 F. Supp.2d 815 (S.D. Ohio 2001).

poenas. The DOL argues that these proceedings should be summary in nature. (Gov. Mem. at 2).

The Third Circuit has noted the court's role: "[T]he district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding." *Wearly v. FTC*, 616 F.2d 662, 665 (3d Cir. 1980). Although a party may not avoid an administrative subpoena on the ground that it has a valid defense to a potential subsequent lawsuit, such a challenge may, in limited circumstances, be mounted when the defense raised is "jurisdictional" in nature- -i.e., when the agency lacks jurisdiction over the subject of the investigation. *See Marshall v. Burlington Northern, Inc.*, 595 F.2d 511, 513 (9th Cir. 1979). To obtain enforcement of an administrative subpoena, the agency must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry is relevant, that the information demanded is not already within the agency's possession, and that the administrative steps required by the statute have been followed. *United States v. Powell*, 379 U.S. 48, 57-58, 85 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). The demand for information must not be unreasonably broad or burdensome. *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986).

Despite the DOL's position, its subpoena enforcement power is not limitless. In *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), the Court emphasized that a subpoena is proper only where "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." Accordingly, "there is no doubt that a court asked to enforce a subpoena

will refuse to do so if the subpoena exceeds an express statutory limitation on the agency's investigative powers." *General Fin Corp. v. FTC*, 700 F.2d 366, 369 (7th Cir. 1983). Thus, a court must "assure itself that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386 (D.C. Cir. 1981); *see also FTC v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977 (en banc). For example, in *EEOC v. Shell Oil Co.*, the Court observed that before the EEOC can insist that an employer obey a subpoena, the party alleging discrimination must file a valid charge, and the employer must receive timely notice of that charge. 466 U.S. at 65, 81-82 (1984). Otherwise, the Court noted, "Congress' desire to prevent the Commission from exercising unconstrained investigative authority would be thwarted." *Id.* at 65.

In *E.E.O.C. v Ocean City Police Department*, 820 F.2d 1378 (4th Cir. 1987), judgment vacated on other grounds, 486 U.S. 1019 (1988), the court sitting en banc held that "in a proceeding to enforce a subpoena issued by EEOC, the district court should review the underlying charge and deny enforcement if the charge shows on its face that it is untimely." *Id.* at 1382. The Fourth Circuit, sitting en banc, finally held that the EEOC lacked authority to investigate a charge that shows on its face that it was untimely because such a charge is invalid. *Id.* at 1380. In reaching this decision, the court first noted that the EEOC had admitted that the charge filed by Wright would be barred in an adversarial proceeding as untimely under Fourth Circuit case law. *Id.* at 1380 & n.5. Stressing that Congress had not given the EEOC unlimited investigatory powers, the court stated that "[t]he only legiti-

mate purpose for an EEOC investigation is to prepare for action against an employer charged with employment discrimination, or to drop the matter entirely if the Commission finds the charge to be unfounded." *Id.* at 1380. The Court concluded that the district court would merely have to apply settled law (i.e., untimely charges are barred) to an undisputed fact (i.e., Wright's charge was untimely) and no more. Id. at 1381. This was, in other words, a "distilled and purely legal question of statutory construction." *Id.* at 1381. The court buttressed its reasoning by pointing out that no discovery would be necessary and that refusing enforcement would meeting congress' desire to limit EEOC investigatory authority, relieve the employer of "a completely unwarranted burden," and free the EEOC to pursue timely charges. The court also found that none of the administrative efficiency concerns voiced by the EEOC applied and that judicial deference to the agency would gain "nothing." *Id.* The court thus endorsed judicial scrutiny of the charge that underlay the subpoena with regard to the issue of timeliness.

In addition, these DOL actions are subject to the constrictions of the Administrative Procedure Act ("APA"), which provides, in pertinent part, that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The statute provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court

In making the foregoing determinations, the court shall review the whole record of those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.This Court must review closely the DOL's requests, jurisdiction, and statutory authority and not be tempted by the DOL's position.[13] The court's role is "neither

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[13] *See generally, Dole v. Milonas*, 889 F.2d 885 (9th Cir. 1989 (attorney-client privilege issues may be raised in opposition t

minor nor ministerial." *See FTC v. Anderson*, 631 F.2d 741, 744 (D.C. Cir. 1979). This Court must review the totality of the circumstances presented and not permit the process to be abused. *S.E.C. v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 124 (3d Cir. 1981). A review shows that the DOL exceeds it statutory authority and lacks jurisdiction, already possesses the information to make a coverage determination, and requests irrelevant and privileged information beyond the scope of the statute.

C. Petitioner Exceeds Its Statutory Authority

In this case, the DOL premises its investigatory authority upon Section 504, which Respondents reproduce in the footnote below for the benefit of the Court.[14] Interest-

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DOL administrative subpoena; protective order is not premature where substantial rights are involved).

[14] (a) Investigation and submission of reports, books, etc.

The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation or order thereunder—

(1) to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and

(2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation,

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if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan.

The Secretary may make available to any person actually affected by any matter which is the subject of an investigation under this section, and to any department or agency of the United States, information under this section, and to any department or agency of the United States, information concerning any matter which may be the subject of such investigation; except that anyinformation obtained by the Secretary pursuant to section 6103(g) of Title 26 shall be made available only in accordance with regulations prescribed by the Secretary of the Treasury.

(b) Frequency of submission of books and records

The Secretary may not under the authority of this section require plan to submit to the Secretary any books or records of the plan more that once in any 12 month period, unless the Secretary has reasonable cause to believe there may exist a violation of this subchapter or any regulation or order thereunder.

(c) Other provisions applicable relating to attendance of witnesses and production of books, records, etc.

For the purposes of any investigation provided for in this subchapter, the provisions of sections 49[14] and 50 of Title 15 (relating to the attendance of witness and the production of books, records and documents) are hereby made applicable (without regard to any limitation in such sections respecting persons, partnerships, banks or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him. To the extent he considers appropriate, the Secretary may delegate his investigative functions under this section with respect to insured banks acting as fiduciaries of employee benefit plans to the appropriate Federal banking agency (as defined in section 1813 (q) of Title 12).

ERISA Sec. 504 (emphasis added)(West 2004).

ingly, in the Petition, the DOL only provided certain sections of the statute, not the entire statute section, including the exceptions and the limitations.

In evaluating a subpoena enforcement action, the Circuit Court noted that section 504 contains well-defined limitations on the Secretary's power to conduct investigations. *Donovan v. Shaw*, 668 F.2d 985, 989-990 (8th Cir. 1982); *see* 29 U.S.C. § 1134 (a)(2), (b). The court noted:

> In the instant case section 504 of ERISA authorizes the Secretary of Labor to investigate "whether any person has violated or is about to violate any (Title I) provision...." 29 U.S.C. § 1134 (a). In addition to incorporating by reference the broad administrative subpoena powers granted to the Federal Trade Commission, 29 U.S.C. § 1134 (c), the section contains two well defined limitations on the Secretary's investigative powers, id. § 1134 (a)(2), (b).....Under both these provisions, the Secretary must establish "reasonable cause to believe there may exist a violation," id., as a condition to enforcement of his subpoena.

Id. at 990 (emphasis added). The Court noted that these exceptions and all limitations should be reviewed if applicable. *Id.*

These exceptions apply herein for the benefit of Respondents as the Petitioner has attempted to enter the premises and requests information that is beyond that "required to be filed with the Secretary in this subchapter." These exceptions were noted in the Objections. Surprisingly, the DOL fails to address a key point of ERISA sec. § 504:

> ERISA provides that any administrative subpoena has to be related to information that would be reportable to DOL. None of the information DOL has subpoenaed is reportable to DOL. First, REAL VEBA is not a MEWA. Second, there is an administrative exemption for insurance-only plans. Under sec. 504 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. REAL VEBA is not a MEWA, according to DOL, so no Form 5500 need to be filed. Life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 504.

(Objections ¶ 9).[15] (emphasis added).

> The DOL has not met its burden regarding requesting of information by establishing that there is a MEWA that DOL may regulate. DOL must first satisfy a preliminary test to determine whether there is any employer or employee control. DEPONENTS already

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[15] The employee benefit arrangements within REAL VEBA arrangement are exempt from ERISA's reporting requirements primarily because they are small, fully insured death benefit plans 29 U.S.C. §§ 1021, 1024 and 29 C.F.R. 2520. 104-21. The REAL VEBA trust is not an employee benefit plan, so it has no reporting requirement under ERISA. It is not a MEWA subject to reporting because it provides death benefits, not health care benefits. 29 CFR Sec. 2520.101-2 (a); see also, Preamble to Regulations 68 Fed.Reg., No. 68, pp. 17493-17495 (April 9, 2003).

provided that information in a previous response to DOL's investigator.

(Objections ¶ 14).

As the DOL requests information that is not reportable and is going beyond its statutory authority, the Court must invoke the standard that the DOL have "reasonable cause to believe that there may be a violation." In reviewing this section, the Eighth Circuit held that the Secretary has the power to make an investigation if there is any basis for believing that an employer has failed to report any employees covered by collective bargaining agreement to a pension fund and has the power to make available to the trust any information resulting from the investigation, stating " we note that there is any reasonable basis for believing that CRST has failed to report any 'covered' employee, the Secretary of Labor has the power to make an investigation." *Central States, Southeast and Southwest Areas Pension Fund v. CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981) overruled on other grounds, by *Robbins v. Prosser's Moving and Storage Co.*, 700 F.2d 433 (8th Cir. 1983) (en banc). Despite being on notice of their own provisions and by way of the Objections, the DOL does not state any facts to indicate that they have "reasonable cause to believe that there may be a violation (of ERISA's reporting requirements)." Accordingly, this Court should deny the enforcement of the subpoenas. *Central States, Southeast and Southwest Areas Pensions Fund*, 641 F.2d 616.

D. The Subpoena Exceeds the DOL's Jurisdiction

In *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), the Court emphasized that a subpoena is proper

only where "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." Accordingly, "there is no doubt that a court asked to enforce a subpoena will refuse to do so if the subpoena exceeds an express statutory limitation on the agency's investigative powers." *General Fin. Cor. V. FTC*, 700 F.2d 366, 369 (7th Cir. 1983). Thus, a court must "assure itself that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386 (D.C. Cir. 1981); *see also FTC v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977) (en banc) (administrative subpoenas should be enforced unless the information sought is irrelevant to "a lawful purpose of the agency").

Despite these cases, the DOL would have this Court believe that its function is to rubber stamp its Petition to Enforce Administrative Subpoenas. The DOL argues that these proceedings should be a summary in nature. (Gov. Mem. at 2). However, "the district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding." *Wearly v. FTC*, 616 F.2d 662, 665 (3d Cir. 1980). The only Objection that the DOL responds to is the question of whether DVL and REAL VEBA are subject, as a whole, to the investigatory coverage of the EBSA. The DOL argues that it cannot make any determination about coverage until it has examined, not just the plan and trust documents of the plans, but an almost limitless range of items, including but not limited to all documents identifying the employers and the employee participants; all the underlying insurance policies and all the documents relating to sales, marketing, advertising, and promotion of the plans and underlying

policies; all the underlying financial records, including the complete bank records; all documents regarding premiums paid regarding the underlying life insurance policies; all records of any expense of the plans and trusts, and any and all correspondence concerning the above. The DOL argument, like the breadth of the request, has a great many words and little relevant substance.

E. Two Federal Courts and the Produced Documents Demonstrate Lack of Jurisdiction and Coverage.

Normally the initial question of coverage reserved for initial determination by the administrative agency seeking judicial enforcement of its subpoena cannot be resolved before the agency has had an opportunity to examine the relevant records. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186. 214 (1946). This matter, however, is not the normal case as two federal courts have reviewed the relevant records and determined that the plans and trusts involved are not employer and/or employer controlled.

Despite having the same documents the federal courts based their determinations upon, the DOL still argues they need to examine further records such as insurance applications, that include private medical information. What the DOL fails to advise this Court is that a determination can be made pursuant to the plan and trust documents, the PRODUCED DOCUMENTS, already produced by Respondents and in the possession of the DOL. Surprisingly two district courts have already reviewed the PRODUCED DOCUMENTS and determined that the DVL VEBA and REAL VEBA are not employee or employer controlled (*See* Bassler Op.). Under the DOL's own internal procedures, the two

district court's rulings about the DVL VEBA and REAL VEBA preclude the DOL's sweeping requests. *See, e.g.* DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. *Gruber v. Hubbard Bert Karle Weber, Inc.* 159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A. Oct. 31, 1996)); *MDPhysicians & Associates Inc. v. State Board of Insurance*, 957 F.2d 178 (5th Cir. 1992) (*Amicus Curiae*-U.S. Secretary of Labor); *Taggart Corp., v. Life & Health Benefits Admin. Inc.*, 617 F.2d 1208, 1210 (5th Cir. 1980); *Donovan v. Dillingham*, 688 F.2d. 1367 (11th Cir. 1982); *Finderne Management Company, Inc. v. Barrett*, 355, 809 A.2d 842 (N.J. App. Div. 2002) (*Amicus Curiae* United States Department of Labor).

Further, the DOL does not need to investigate to determine jurisdiction and coverage when two district courts have already made the underlying factual determination and the DOL is estopped from challenging the factual findings of the two courts. The inquiry of whether an employee benefit plan exists and the type is a question of fact. *Diebler v. Local Union 23*, 973 F.2d 206, 209 (3d Cir. 1992) (employer can establish benefit plan by purchasing insurance or by subscribing to a multi-employer trust.); *see also* 29 U.S.C. § 1002 (employer established EWBP "through the purchase of insurance or otherwise")(emphasis added). The DOL is collaterally estopped from re-litigating this issue as to whether the DVL and REAL VEBA are employee or employer controlled so as to fall within the DOL's purview. The doctrine of collateral estoppel, now commonly referred to as a issue

preclusion, prevents parties such as the DOL from litigating again the same issues when a court of competent jurisdiction has already adjudicated the issue on its merits. *Schroeder v. Acceleration Life Ins. Co.*, 972 F.2d 41, 45 (3d. Cir. 1992). Issue preclusion "forecloses relitigation in a later action [ ] of an issue of fact or law which was actually litigated and which was necessary to the original judgment." *Hebden v. Workmen's Compensation Appeal Bd.*, 632 A.2d 1302, 1304 (Pa. 1993); *see also* Restatement (Second) of Judgments, § 27 cmt. (c) (1982) ("An issue on which relitigation is foreclosed may be one of evidentiary fact, of 'ultimate fact' (i.e. the application of law to fact), or of law."). As the Supreme Court has observed, this doctrine reduces the costs of multiple lawsuits, facilitates judicial consistency, conserves resources, and "encourage [s] reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

F. The DOL is Being Improperly Used to Circumvent Pending Litigation in Which the DOL Could Intervene.

The DOL is attempting to circumvent a case already before this Court and subvert the judicial process. DEPONENT, as litigant or counsel in on-going litigation, has the right to find out if DOL is being used by Sidney Charles Markets, as that goes to the "rightfulness" of the subpoena. The information being requested is clearly tied to the SCM litigation as the only employer in the DVL is SCM. "It is obvious importance to all the litigants to have a single determination of their controversy, rather that several decisions which if they conflict may require separate appeals to different circuit courts of appeals." *Crosley*, 122 F.2d 930. Comity must serve as a guide to courts to exercise forbearance to

avert conflicts and to avoid "interference with the process of each other." *Kline*, 260 U.S. at 229. If the DOL is interfering in litigation, DEPONENT has the right and authority to fight the subpoena simply on that basis, and assert that the procedures of the Court vested with jurisdiction in that matter and the discovery provisions of the Federal rules take precedence. The only employer in the DVL after 1999 was SCM. Where an administrative agency seeks the aide of a court in enforcing its order, the court must not permit its process to be abused. *United States v. Powell*, 379 U.S. at 58. This Court should not allow it processes to be abused by litigant, SCM, that has stated it would use the DOL in just such a manner. (Miller Aff. ¶ 4). The DOL requests are an interference and abuse attempting to circumvent present litigation. The Court should not allow such abuse as against the spirit and integrity of the legal system.

G. The Information Requested is Irrelevant and Privileged.

In proceeding to enforce administrative subpoenas duces tecum, the district court may impose reasonable conditions and restrictions with respect to the production of the subpoenaed material if the demand is unduly burdensome. *F.T.C. v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977). The court must determine whether information sought in a subpoena issued by the agency, pursuant to its general investigatory powers is reasonable, relevant and not overly broad. *E.E.O.C. v. Gladieux Refinery, Inc.*, 631 F. Supp. 927 (N.D. Ind. 1986).

The Supreme Court has said, with regard to an IRS summons, that the witness may challenge the summons "on

any appropriate ground." *Resiman v. Caplin*, 375 U.S. 440, 449 (1964); *United States v. Powell* 379 U.S. 48, 58 (1964). "An administrative agency is not automatically entitled to obtain all material that may in some way be relevant to a proper investigation. Rather...the agency must make some showing of need for the material sought beyond its mere relevance to a proper investigation." *Federal Election Comm'n v. Larouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987) (per curiam). The Court must review the totality of the circumstances presented. *S.E.C. v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 124 (3d Cir. 1981). When personal documents of individual are the subject of an administrative subpoena, privacy concerns must be considered. *See Whalen v. Roe*, 429 U.S. 589, 599 (1977). Thus, in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3d Cir. 1980), where a governmental agency sought production of employee medical records, the Court listed as relevant factors such matters as the type of record requested, the information that it might contain, the potential for harm and subsequent nonconsensual disclosure, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, the specificity of the agency's statutory mandate, and the presence of recognizable public interest justifying access. *See also In re McVane*, 44 F.3d 1127, 1137 (2d Cir. 1995) (agency subpoenas directed at individuals do implicate privacy rights); *Resolution Trust Corp. v. Walde*, 18 F.3d 943, 948 (D.C. Cir.1994) (same).

Here the DOL's subpoenas contain broad requests for irrelevant and/or privileged documents, such as all documents concerning life insurance policies, which include personal applications containing the most sensitive of health information, e.g. disclosures of diseases, alcoholism, herpes,

HIV status, and treatment/hospitalization for mental/emotional disorders.

Furthermore, the DOL requests the contents of the legal files and on-going litigation files of REAL— further even goes to the length of asking for these files from the plan and trust's counsel, Attorney Koresko. The Third Circuit has made it clear that such information is covered by the attorney-client privilege and is not subject to disclosure. *United Stated v. Liebman,* 742 F.2d 807 (1984) (attorney not required to turn over identities of clients and other information to IRS as part of investigation of tax-motivated transaction).[16] Furthermore, courts have determined that an admin-

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[16] In *Liebman,* IRS attempted to compel the names of a tax lawyer's clients. The Third Circuit held that disclosure of names would be tantamount to disclosing client confidences. IRS could not get the information. The present case involves section 419A (f)(6) arrangements, which IRS has been litigating since before its announcement of intent to litigate in Notice 95-34 1995-1 C.B. 309; 1995-23 I.R.B. 109 (June 5, 1995). DOL Enforcement Manual, Chapter 12, paragraph 25, mandates free exchange of information between DOL investigators and IRS. *See,*

http://www.dol.gov/ebsa/programs/oemanual/chap12.htm. This free exchange is not compelled by statute, and is uncontrolled, yet would it puts DOL in a position to obtain information IRS could not get under Leibman. Such an anomalous result cannot stand and makes a mockery of the attorney client privilege and work-product doctrines. All the REAL VEBA arrangements were instituted in anticipation of the litigation threatened in Notice 95-34.

istrative agency cannot undermine the roles of the courts to regulate attorneys.[17] *New York Bar Ass'n v. F.T.C.*, 276

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[17] The New York State Bar Association (NYSBA) and the American Bar Association (ABA) won an important victory in their consolidated actions challenging the Federal Trade Commission's (FTC) efforts to regulate the confidentiality practices of lawyers under the Gramm-Leach-Bliley Act (GLBA), when, on August 11, U.S. District Judge Reggie B. Walton denied the FTC's motion to dismiss. While technically only a threshold ruling, commentators almost universally agree that the analysis presented by Judge Walton's extensive memorandum opinion suggests that the ruling could prove dispositive.

Judge Walton found "most convincing" the" absence of any explicit statement by Congress that it intended to legislate in an area already regulated by existing state regulatory schemes." This conclusion was important in light of his reading recent Supreme Court cases to say that Congress "does not alter the fundamental details of regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Through such reasoning, he was "unable to conclude" that "Congress intended for the GLBA's privacy provisions to apply to attorneys who provide legal services in the fields of real estate settlement, tax-planning and tax-preparation." Recent Supreme Court decisions have limited ERISA pre-emption of state functions unless explicitly stated by Congress:

"In trying to extrapolate congressional intent,....we "have no choice" but to temper the assumption that" the ordinary meaning....accurately expresses the legislative purpose. "id., at 740, 105 S.Ct. 2280 (quoting Park N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S. Ct. 658, 83 L.Ed.2d 582 (1985)), with the qualification "that the historic police powers of the States were not [meant] to be superseded by the Federal Act unless that

F.Supp.2d 110 (D.D.C. 2003). The DOL's power is no greater that the FTC power. Therefore, if it violates fundamental rules of federalism and separation of powers for the FTC to attempt a regulate attorneys, then the DOL, which depends on FTC statutes for its subpoena authority, cannot similarly regulate or command attorneys. As Judge Walton said:

> Implicit in the FTC's interpretation....is its assumption that Congress somehow delegated to the FTC the authority to regulate the ethical conduct of attorneys practicing in certain areas of the law with respect to how these attorneys keep their clients' information confidential and their dissemination of such information. The FTC come to this conclusion even though there is no reference to attorneys in the [statute], but solely because...[of] several activities that are also performed by attorneys engaged in the practice of law. This Court cannot agree that Congress would give the FTC jurisdiction to regulate the ethical con-

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was the clear and manifest purpose of Congress. "Travelers, supra, at 655, 115 S. Ct. 1671 (quoting Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230, 67 S. Ct. 1146, 91 Led. 1447 (1947)).

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 363, 122 S. Ct. 2151, 2159 (2002); New York State Conference of Blue Cross & Blue Shield Plans Plans v. Travelers Ins. Co., 514 U.S. 645, 656, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995),

There is nothing in ERISA manifesting any intent to supercede the authority of state Supreme Courts over attorneys. See, 29 USC sec 1001 (Congressional statement of purpose and intent).

duct of attorneys through such a subtle grant of authority.

Id. at 115.

As demonstrated above, this Court must review the totality of the circumstances present and not permit the process to be abused. *S.E.C. v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 124 (3d Cir. 1981). The Court should weigh the information requested, the litigation involved, and the fact that the DOL requests such information from a law firm. Under the totality of the circumstances, and in light of recent clarifying precedent, this Court should deny the Petition.

H. By serving the subpoenas and filing the petition to enforce the subpoenas, the DOL is abusing the legal process.

A party is liable for abuse of process when it uses the legal process primarily to benefit someone "in achieving purpose which is not authorized goal of procedure in question, not whether it was used to achieve purpose or advantage unrelated or collateral to entire underlying litigation proceeding." *General Refractories Co. v. Fireman's Fund Ins. Co.*, 2003 WL 21715320, (3d Cir. 2003). To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff. Abuse of process is, in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. Thus, "the gravamen of this tort is the pervesion of legal process to benefit someone in achieving a purpose which is not authorized goal of the pro-

cedure in question." *Harris v. Brill*, 844 A.2d 567 (Pa. Super. Ct. 2004) (citing *Werner v. Plater-Zyberk*, 799 A.2d 776, 785 (Pa.Super.Ct.2002)).

Here, the DOL clearly used the legal process of issuing and then enforcing a subpoena against DEPONENTS. The legal process which DOL used against DEPONENTS is the issuance of the subpoena and the initiation of this petition to enforce that subpoena. "Process," as used in tort of abuse of process under Pennsylvania law, is interpreted broadly, and encompasses the entire range of procedures incident to litigation process, including discovery proceedings, noticing of depositions, and issuing of subpoenas. *General Refractories Co. v. Fireman's Fund Ins. Co.*, 2003 WL 21715320 (3d Cir. 2003). After the DOL violated its own internal procedures by issuing that subpoena, it then further abused the legal process by thumbing its nose at the Rules of this Court by filing a petition to enforce that subpoena without first making any effort to "meet and confer" about the discovery dispute. As such, the DOL has clearly used the legal process against Plaintiffs by issuing the subpoena and then filing the petition to enforce.

The DOL used the legal process of issuing and enforcing subpoenas to accomplish a purpose for which it was designed. It appears that the DOL may have issued the subpoenas at the behest of SCM, a party in an active litigation with DEPONENTS. Prior to the subpoenas being issued, SCM's counsel, in a conversation with the undersigned counsel for DEPONENTS, indicated that he had contaced the DOL and would "use the DOL" to get the funds from an employee death benefit for his employer client to reimburse the employer for embezzlement by a deceased employee.

(Miller Aff. ¶ 14). That the DOL has not identified the purpose for its subpoena, and has not divulged what type of investigation is a fiduciary investigation pursuant to Program 48,[18] then the DOL misstated the name of the case; REAL VEBA" is not a fiduciary, it is a plan. Moreover, the issue of whether John J. Koresko, V, Esq. and others fulfilled their fiduciary duties has already been decided by Judge Bassler and Judge Hutton. They both held that SCM could not sustain allegations of fiduciary breach against Attorney Koresko in the SCM cases.[19] If, on the other hand, the DOL issued the subpoena under the guise of conducting an investigation of participants' rights, then the DOL should intervene in the active litigation in which SCM, the only employer who was left in the DVL VEBA plan [before SCM was terminated for nonpayment of premiums and fees] is a party. As an intervenor, DOL can request discovery in that case rather than attempting to circumvent the judicial process under the guise of a trumped up investigation. The facts show, however, that SCM was never in REAL VEBA, and the Respondents are aware of no complaints that could have prompted the DOL's interest in REAL VEBA. This further implicates the bad faith use of the administrative subpoena process. There is no

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[18] Program 48 refers to the language used in the DOL Enforcement Manual for investigations of alleged fiduciary wrongdoings. A predicate to this process, however, is the existence of an ERISA plan.

[19] [SCM had attempted to argue that Attorney Koresko violated fiduciary duties by applying the terms of the plan. The Judges said that the SCM matter is a benefits payment dispute, not a fiduciary breach case.]

reason to force Respondents into two fights if the issues are the same.

Aside from lacking jurisdictional predicates the DOL is prematurely resorting to the remedy of filing a petition to enforce the subpoena. According to Local Rule 26, 1, before the DOL filed the petition to enforce it first had a duty to "meet and confer" with counsel for DEPONENTS rather than running to the courthouse doors. Here, the DOL was well aware of DEPONENTS' objections to the subpoenas, had the PRODUCED DOCUMENTS in hand, and yet failed to "meet and confer" with the undersigned counsel before filing the petition to enforce.

Finally, Respondents assert that the DOL is barred from this action by the three year statute of limitations. ERISA § 413, as amended, 29 U.S.C.A. § 1113. SCM began its lawsuits against REAL VEBA and DVL VEBA more than three years ago. Judge Bassler issued his opinion several years ago. SCM was obviously aware of its rights, and should have complained to DOL then. DOL should be deemed on constructive notice of U.S. District court decisions involving employee benefit plans. If this Court does not hold that DOL is barred from this investigation, it will create a dangerous precedent. Basically, a plan sponsor could be protected by sec. 413 from a participant's lawsuit, yet be subject to an unlimited period for civil enforcement by DOL if DOL conveniently characterizes its litigation under a different premise. This would be an absurd result, given the statutory framework in ERISA sec. 502 that vests the DOL with the same right to litigate on behalf of participants as the participants would themselves have. The rule should be that once participants bring an action, or are barred from suing by

the ERISA statute of limitations, the DOL cannot extend the statute of limitations simply by recharacterization of the true predicate of an investigation, or by the inaction or the failure of participants to make a timely report to DOL.

Since the DOL used the subpoena and enforcement process against the DEPONENTS primarily to accomplish a purpose for which the process was designed; and DOL has no reasonable basis for its investigation; and the DOL is barred from obtaining information that IRS could not get under privilege and work product doctrines; and DOL has no more rights than the FTC to regulate the business of attorneys; and the SCM dispute began more than three years ago; and harm has been caused to the DEPONENTS; the DOL's petition to enforce should be denied

C. CONCLUSION

WHEREFORE, RESPONDENTS respectfully request that this Honorable Court DENY the Petition; and consider the allowance of attorney fees to RESPONDENTS as prevailing parties under ERISA and 28 USC §§ 1388 and 1397.

Dated: May 5, 2004

VIM-1712

Virginia I. Miller
(I.D. No. 85361)

APPENDIX L – AFFIDAVITS OF JOHN KORESKO, DATED MAY 5, 2004

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELAINE CHAO, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,

Petitioner,

Case No.: 04: MC:00074 (MAM)

-vs.-

JOHN J. KORESKO, V;
REGIONAL EMPLOYERS' ASSURANCE LEAGUES;
DELAWARE VALLEY LEAGUE;
PENN-MONT BENEFIT SERVICES, INC.;
and KORESKO & ASSOCIATES.

Respondents.

AFFIDAVIT OF JOHN J. KORESKO, V, ESQUIRE IN SUPPORT OF LAWYER RESPONDENTS'[1] AND ADMINISTRATIVE RESPONDENTS'[2] RESPONSE TO THE DEPARTMENT OF LABOR'S PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO JOHN J. KORESKO, V, ESQUIRE; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC; and THE LAW FIRM OF KORESKO &ASSOCIATES, P.C.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF MONTGOMERY : SS

I, JOHN J. KORESKO, V, ESQUIRE, being duly sworn, depose and state the following:

1. I am an attorney at law (since 1984) and certified public accountant (since 1981), licensed to practice both professions in Pennsylvania and Florida.

2. I enjoy a reputation for honesty, integrity, and competency in my profession throughout the United

---

[1] JOHN J. KORESKO, V. ("ATTORNEY KORESKO"); KORESKO & ASSOCIATES, P.C. ("KAPC") (collectively "LAWYER RESPONDENTS")

[2] PENN-MONT BENEFIT SERVICES, INC. ("PENN-MONT"); REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE ("DVL") (collectively "ADMINISTRATIVE RESPONDENTS")

States in taxation and ERISA matters, and have regularly acted to assist Members of Congress and the Department of Labor on issues involving welfare benefit plans. See attached Ex. A, Letter from Congressman Jim Gerlach (PA – 6th); Ex. B, Professional Biography.

3. I wrote the plan and trust documents for the Delaware Valley Leagues ("DVL") VEBA Trust ("DVL VEBA") and the Regional Employer Assurance Leagues ("REA") Voluntary Employees Beneficiary Association ("REAL VEBA").

4. Both DVL and REAL are unincorporated, loose associations of those employers who with to provide benefits; however neither the employers who joined nor their employees control DVL and REAL.

5. My brother and I are the only persons who have signed documents or taken actions on behalf of DVL and REAL, and we report to no superiors in that regard.

6. Neither DVL nor REAL is an employee benefit plan.

7. I applied for and received determination letters from the IRS that the forms of plan used by DVL VEBA qualified as section 501 (c)(9) VEBAs.

8. REAL VEBA was constructed IN all relevant respects identically to DVL VEBA, but needed to be amended in 1995 to reflect the requirements of its successor trustee.

9. In the plan documents of DVL VEBA and REAL VEBA, my law firm was given power of attorney by each participant to represent them with respect to tax and other matters concerning DVL and REAL VEBA.

10. My law firm also has power of attorney from the present trustee of REAL VEBA.

11. I am on the Plan Committee of each employee benefit structure under DVL VEBA and REAL VEBA, and have power to act for the Committee.

12. The Plan Committee has no authority but to review and authorize the initial purchase of insurance contracts while a plan administrator is in office.

13. I am the sole shareholder of Koresko & Associates, PC (KAPC) the entity through which I practice law.

14. PennMont Benefit Services, Inc. (PM) is a corporate affiliate of KAPC that was set up so that my brother could have an equity participation, since he is not a lawyer.

15. PM has no employees and no physical assets; and PM functions like a division of KAPC on the premises of KAPC.

16. All persons who perform administrative functions for REAL VEBA are employees of KAPC, use assets of KAPC, and are instructed as to the mandates of attorney-client privilege.

17. All files of DVL VEBA and REAL VEBA are owned by and in the possession of the law firm KAPC.

18. REAL VEBA and DVL VEBA were constructed as Internal Revenue Code § 419A (f)(6) arrangements.

19. I constructed these plans knowing that IRS had an adverse opinion of them as demonstrated in the Tax Court cases of Schneider v. Com'r (1992) and Moser v. Com'r (1988) and Wellons v. Com'r (1992).

20. The adverse litigation position of IRS and its intention to litigate against § 419A(f)(6) plans was publicized in the Internal Revenue Bulletin, in Notice 95-34, issued June 5, 1995.

21. Each client who adopted DVL and REAL VEBA was made aware of IRS'position from the materials we disseminated and my book, "The VEBA – Understanding Multiple Employer Voluntary Employees Beneficiary Associations."

22. In fact, IRS audited the deductions of two clients, including Sidney Charles Markets ("SCM").

23. To date, as a result of our skilled representation for over six years, SCM has not been forced to pay an additional tax as a result of its deductions; if fact, I persuaded IRS Appeals Officer Michael Kopytko to recommend no change in tax to his superiors.

24. It is my belief, as a result of my direct knowledge of the circumstances surrounding each implementation of REAL VEBA and DVL VEBA, that ALL DOCUMENTS prepared in connection with REAL

VEBA and DVL VEBA were prepared under threat of imminent litigation.

25. DVL and DVL VEBA no longer function, as all eligible employers joined REAL VEBA; and the only one who did not, SCM, was involuntarily terminated for reasons described in various court documents involving litigation with them.

26. In 1998 (I believe), IRS attempted to obtain client data from my firm and served me with administrative subpoenas regarding DVL VEBA and REAL VEBA.

27. I successfully resisted the administrative subpoenas on the basis of attorney-client privilege and work product doctrine; and to date, I have not given IRS any confidential data regarding participants and employers in DVL VEBA and REAL VEBA.

28. I have consistently treated KAPC, PM, REAL, REAL VEBA, DVL, and DVL VEBA records as privileged.

29. I asserted privilege in litigation started by SCM; and in the District of New Jersey I refused to testify regarding privileged information despite threats made against me by U.S. Magistrate Judge Hedges.

30. My claims of privilege regarding the information and files of DVL, DVL VEBA, REAL, REAL VEBA, PM and KAPC have not been overruled by any court of competent jurisdiction.

31. There are over 500 files involved with REAL VEBA and the DVL VEBA, and the files contain thousands of documents.

32. On or about mid-February, 2004, I received subpoenas from the DOL. Even though I believed the subpoenas to be misdirected and inappropriate, I responded and provided information in a manner which comports with my obligations as counsel for the Trust. See Ex. "C" and "D", correspondence to DOL Investigator Bindu George.

33. It would cost thousands of dollars in time and materials to reproduce the documents requested by DOL in their subpoenas; and it would work a substantial hardship on our small firm because of the expense and diversion of personnel that would be required from normal service of our clients.

34. I am aware of no complaint to the DOL about the operations of DVL VEBA or REAL VEBA other than that lodged by SCM after litigation resulted in rulings adverse to it.

35. Neither I, my firm, nor my employees or associates have committed any violation of any law or breached our fiduciary duties; and especially, we have not have violated ERISA.

36. I believe the DOL's actions in this matter are purely vindictive and not in good faith, and not on any reasonable basis, especially given the negative and unresponsive comments delivered to me from Investigator Bindu George and Attorney Natalie Appetta of the Department of Labor.

FURTHER AFFIANT SAYETH NAUGHT.

JOHN J. KORESKO, V, ESQUIRE

SUBSCRIBED AND SWORN
BEFORE ME THIS 4TH
DAY OF MAY, 2004.

NOTARY PUBLIC
MY COMMISSION EXPIRES:
9-30-07

Congress of the United States

House of Representatives

Washington, DC 20515-3806

February 25, 2004

Ms. Mabel Capolongo
Regional Director-Philadelphia Region
U.S. Department of Labor
Employee Benefits Security Administration
The Curtis Center-Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106

Dear Ms. Capolongo:

I am writing in reference to John J. Koresko, Esquire, a constituent who has provided my office with tax advice on various pieces of legislation and is head of the law firm Koresko & Associates, PC representing PennMont Benefit Services, Inc. and Regional Employers Assurance Leagues VEBA trusts (REAL VEBA).

Mr. Koresko expertise in tax and ERISA matters are well-known and respected and he has participated in numerous Congressional proceedings and activities to further legislation that promotes employer use of welfare benefit plans. Included among the legislators who have benefited from Mr. Koresko's expertise have been U.S. Senator Rick Santorum, Congressman Phil Crane, Congressman Phil English and the

staffs of the House Ways and Means Committee and the Senate Finance Committee.

I also understand that Mr. Koresko has been of assistance to your office, the Boston office of DOL/EBSA and Assistant U.S. Attorney Michael Pineault in the Boston office of the United States Attorney.

In short, Mr. Koresko has been of great assistance to me and other Members of Congress on important tax, ERISA and welfare benefit plan issues and I look forward to his continuing advice and counsel as these issues continue to be reviewed and debated.

I hope you have the opportunity to take benefit of Mr. Koresko's expertise and advice on matters that come before your office. His services could most useful.

Sincerely,

Jim Gerlach
Member of Congress

JG: mw
Cc: Hon. Elaine Chao, Secretary, U.S. Department of Labor
Howard Radzely, Solicitor, U.S. Department of Labor
Tom Donnelly, Jefferson Government Relations
John J. Koresko, Esquire

JOHN J. KORESKO, V
Member

Firm Profile: Koresko & Associates, A Professional Corporation

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200 W. 4th Street
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(Montgomery Co.)

Telephone: 610-992-2200
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Practice Areas: *Primary*- Taxation; Estate Planning; ERISA; *Secondary*- Debtor and Creditor; Closely Held Business Law; Real Estate.

Admitted: 1984, Florida; 1985; Pennsylvania, U.S. District Court, Eastern District of Pennsylvania, U.S. Tax Court and U.S. Bankruptcy Court

Law School: University of Miami, J.D., 1983

College: Clemson University, B.S., accounting, magna cum laude, 1979.

Member: Montgomery, Pennsylvania Bar Associations; The Florida Bar; American Institute of Certified Public Accountants; Florida Institute of Certified Public Accountants. Co-Chairman- Fla. Bar Tax Section Civil Tax Procedure Committee (2003-04).

Professional Designations: Certified Public Accountant: Florida, 1981; Pennsylvania, 1987.

Teaching: Former Adjunct Professor, Pierce Junior College (Accounting); Penn State Univ. (Bankruptcy). Instructor at over 200 continuing education programs on tax, welfare benefit plan, retirement, and estate planning matters.

Authorship:

Professional Journals—"SEPs Are an Easy Alternative for Cost-Conscious Employers," 19 Taxation for Lawyers 218 (January 1991);" Simplified Employee Pension Plans: The 90's Alternative, "Small Business Chronicle (June 1990); " FEDERAL TAX NOTES: Battle of the Tax Benefit Rule/Crane Confusion," News Notes, Fla. Inst. of CPAs (April 1983"'419' Welfare Plans Require Careful Drafting to Survive IRS Attack," 3 Journal of Taxation of Employee Benefits 147 (Nov./Dec. 1995); "Notice 95-34 Represents a line in the Sand for '419' Plans, "3 Journal of Taxation of Employee Benefits 223 (Jan./Feb/ 1996); "VEBAs Can Reduce Taxes and Preserve Wealth, "57 Taxation for Accountants 333 (Dec. 1996); "Sorting Out Excise Tax Issues for Welfare Plans," National Underwriter (January 7, 1997); "Reflections on Booth," Journal of Pension Benefits, Vol. 7, No. 4, p. 39 (Summer 2000); "Making Welfare Plans Work," Advisor Today (NAIFA: Sept. 2000); "Current Developments in Sec. 419 Plans: Don't Call the Coroner Yet," privately distributed by the American Society of CLU and ChFC Estate Planning Section (1995); Bulls and Bears prefer VEBAs," (1999); "Insurance Sponges and PTE 92-6," Journal of Pension Benefits (Summer 2001), p.38 "Neonatology: A case About Greed, Not VEBAs," Journal of Pensions Benefits (Winter 2002); "Section 412(i) Plans: Emerging Abuses Involving Depressed Cash Value Insurance," Journal of Pension Benefits (Winter 2003); "The Dark Side of the

Tax Shelter Transparency Act," Fla. Bar Tax Sec. Newsletter (Sept. 2003).

Treatise Citations—"Multiple Employer VEBAs, "Life Insurance Answer Book (for Qualified Plans and Estate Planning), Ch. 3º (Panel: New York 1999, supp. 2000)"Severance Pay Plans", Life Insurance Answer Book Policy?" (for qualified plans and estate planning,), Ch. 20 (Panel: New York 1999, Sup. 2000); "What is the Value of a Policy?" Life Insurance Answer Book (for qualified Plans and Estate Planning), Ch. 20 (Panel: New York 1999, supp. 2000); "The VEBA: Understanding Multiple Employer Voluntary Employees' Beneficiary Associates, "PennMont Benefit Services (1995 to 2000); 457 Answer Book, "Severance Pay Plans", Ch. 12 (Panel: New York (2000-2002).

Law Review Article: Koresko, J. and Martin, J., "VEBAs, Welfare Plans & Sec. 419A(f)(6): Is the IRS Trying to Regulate or Spread Propaganda?" 32 Southwestern Univ. Law Review 1 (2003).

Expert Witness Engagements

Kruse v. Commissioner, U.S. Tax Court No. 15352-95 [Taxpayer's expert on issues involving VEBAs and welfare benefit plans] (Report March 26, 1997; Stipulation of Settlement filed April 14, 1999).

2002, *Firmani v. Amer. Buying Retirement Svcs*, Inc., et al, D.N.J. (No. 00-5605). [Defendant's expert on tax and ERISA issues involving welfare benefit plans; case settled 2003; retained by Schnader Harrison, et al.].

2002, *Brown v. Godwin Pumps of America, Inc.*, D.N.J. (No. 02-CV-775). [Defendant's expert of tax and ERISA issues involving severance benefit plans; retained by Montgomery McCraken, et al.].

2003, *Phan v. Indianapolis Life Ins. Co.*, et al, Orange Cty. Cal. Super. Ct., No. 02CC00005 [Plaintiff's class action consultant on tax and ERISA issues involving use of unsuitable "continuous term" life insurance in welfare benefit plans; retained by Berger & Montague].

2003, *Sankhla, et al. v. Commonwealth Life Ins. Co.*, D.N.J. (No. 01-CV-0478 (AET)), [Plaintiff's class action consultant on tax and ERISA issues involving use of unsuitable "continuous term" life insurance in welfare benefit plans; retained by Berger & Montague].

2003, *Indianapolis Life Ins. Co. v. Hodges*, L.A. Cty., Cal. Super. Ct., No. BC 287985 [Defendant's expert on tax and ERISA issues involving use of unsuitable springing cash value life insurance in welfare benefit plans].

Quotations as Expert:

G. Taggart, "Uses and Abuses of 412(i) Plans," *Bloomberg Wealth Manager* (October 2003)

S. Leimberg, "Keeping Current: Sec. 419A(f)(6) Plans," Soc. Fin. Svc. Prof. (December 2001)

Legislative Citations:

Bills—Employee Welfare Benefit Equity Act of 1999, Santorum Amendment No. 1451, Congressional Record,

Senate p. S9830 (July 29, 1999); Employee Welfare Benefit Equity Act of 2002, S.1386 (107th Cong).

Consultation—2002-3, Consultant to various staff of House Ways & Means and Small Business Committee members and Senate Leadership on legislation and regulations involving IRC §419A(f)(6) and tax shelters; draftsman of Committee correspondence to Treasury Dept. officials

Comments—Coopers & Lybrand National Firm Comment on Proposed Regulations under Internal Revenue Code Section 168, submitted to Treasury Department on May 16, 1984. p. 3-7.; Comments on Proposed Regulations under IRC sec. 419A(f)(6) (testimony before Treasury Dept. 11/11/02).

Reported Cases:

Koresko v. Farley,__A.2d__, 2003 WL 23318662 (Pa. Cmwlth. March 10, 2004); *pet. For allocatur pending; Koresko & Associates, P.C. v. Farley*, 2003 Pa. Super. 188, 826 A.2d 6 (2003) (reversing Mont. Co. C.C.P., Nicholas, J.); *In re Dupell*, 235 B.R. 783 (Bankr. E.D. Pa. 1999); *In re Toms*, 229 B.R. 646 (Bankr. E.D.Pa. 1999); *Carriage Properties, Inc. v. Arrington*, 152 F.R.D. 488 (E.D.Pa.1994); *In re Farley*, 158 B.R. 48 (E.D.Pa.1993)

Born: Norristown, Pennsylvania, December 21, 1958.

Koresko & Associates

A PROFESSIONAL CORPORATION

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Bridgeport, Pennsylvania 19405
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Fax: (610) 992-1091

John J. Koresko, V
Jeanne D. Bonney

Certified Public Accountant
Also Admitted in Florida
Also Admitted in New Jersey

July 2, 2003

Bindu Gerorge, Ivestigator
Employee Benefits Security Administration
The Curtis Center – suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317

Re: Your letter of July 1

Dear Ms. George:

I received your letter of July 1 and your request for a visit to the offices of PennMont Benefit Services, Inc. I previ-

ously tried to explain to you during our telephone call that this law firm occupies this entire address pursuant to a lease and the building is owned by another entity. Therefore, your letter is defective to the extent it is addressed to me at PennMont Benefit Services, Inc. The staff of my law firm should not have accepted that letter in the fashion it was addressed.

All information about the clients of this firm who are in any way connected with the Regional Employers Assurance Leagues and any VEBA trust written by me is privileged. PennMont Benefit Services, Inc., a client of this firm, has delegated all responsibility regarding same to this law firm. PennMont has no employees, and all records belong to this firm. Therefore, your demand for records cannot be met as you have stated them.

You have made the assumption that the Department of Labor has authority to demand the information you request in your letters. I disagree. As an accommodation, I will answer the questions that I feel are appropriate, and I will explain to the prevailing law in the United States as it applies to multiple employer welfare arrangements ("MEWAs") and non-MEWAs. However, I will not disclose information that is protected by attorney-client privilege and we preserve the right to assert such privilege and the work product doctrine. We do not waive any right to protest further inquiry for the reasons stated herein.

The following are answers that correspond to paragraph numbers in you letter:

1. PennMont is a Pennsylvania corporation. A copy of its articles of incorporation are on file with the Secretary of State of Pennsylvania.

2. I believe this information is privileged and beyond the scope of your authority.

3. PennMont is named as a plan administrator of welfare benefit plans, but has delegated such authority to this law firm.

4. We do not believe any such documents exist because PennMont does not promote any group health, accident, dental vision or prescription plans. Furthermore, PennMont does not promote group life insurance within the meaning of Internal Revenue Code Sec. 79 and the Regulations thereunder. See, General Counsel Memorandum 39440.

5. These documents are beyond the scope of your authority to demand. "REAL" is an organization which is not an employee benefit plan within the meaning of ERISA. The Employee Retirement Income Security Act ("ERISA") defines a "multiple employer welfare arrangement" ("MEWA") as an employee welfare benefit plan or other benefit arrangement established or maintained for the benefit of employees of two or more employers to provide health are and/or other welfare benefits to those employees and their dependents. 29 U.S.C. § 1002(40). While such an arrangement may be an ERISA-covered plan, most MEWA(s) are not ERISA-covered plans since they are usually not established or maintained by an employer or employee organization. See, Gruber v. Hubbard Bert Karle Weber, Inc., 159 F. 3d 780, 787 (3d Cir. 1998); cited with approval, Finderne Management Company,

Inc. observations of the Finderne court to be quite applicable in this circumstance:

> "To constitute a multiple employer" employee welfare benefit plan" under ERISA, the group of employers that establishes and maintains the plan must be a bona fide association of employers brought together by a common economic or representation interest, unrelated to the provision of benefits, and the employer members must exercise control, either directly or indirectly, both in form and substance, over the plan. Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780, 787 (3d Cir. 1998) (internal quotations and citations omitted). Multiple employer plans established merely for entrepreneurial purposes, such as the marketing of insurance products or services, are not considered ERISA plans. Id. at 786 (citations omitted); Taggart Corp., et. al. v. Life & Health Benefits Admin. Inc., et. al., 617 F. 2d 1208, 1210 (5th Cir. 1980). Here, the EPIC Plan is not a multiple employer benefit plan."

Accord, Donovan v. Dillingham, 688 F.2d 1367, at p. 1373-75 (11th Cir. 1982). To the extent that any plan connected with REAL bears similarly to the EPIC plan in Finderne, and the Lake Erie Employers Association discussed in Gruber, we assert that the same law applies and we are entitled to rely upon it until there is some distinguishing authority to the contrary. In ERISA Advisory Letter 90-31, 1990 LEXIS 20 (9/30/90), the Department of Labor said that the Kansas Independent Bankers Association ("KIBA") Trust was subject to STATE regulation under ERISA sec. 514(b)(6). See

also, ERISA Advisory Op. 1994-42, 1994 ERISA LEXIS 42 (7/15/94); ERISA Advisory Op. 94-07, 1994 ERISA LEXIS 11 (3/14/94); ERISA Advisory Op. 90-18, 1990 ERISA LEXIS 26 (7/2/90) (dealing with MD Physicians and Associates Inc. Employee Benefit Plan, and subsequently overruled); ERISA Advisory Op. 88-05, 1988 ERISA LEXIS 6 (3/16/88); ERISA Advisory Op. 84-43, 1884 ERISA LEXIS 5 (11/5/84). Subsequent decisions by the Fifth Circuit in MD Physicians & Associates Inc. v. State Board of Insurance, 957 F.2d 178 (5th Cir. 1992) and the Third Circuit in Gruber invalidated the portions of such Labor Department opinions that suggested the plans were MEWAs described in ERISA secs. 3(40) and 514(a)(6)(A).

REAL would be subject to any rules of the Pennsylvania Insurance Commission governing fully-insured arrangements pursuant to the authority of the McCarran Ferguson Act (states have complete and exclusive authority to regulate the business of insurance) and ERISA sec. 514. Rush Prudential HMO, Inc. v. Moran, 122 S. Ct. 2151, 153 L.Ed.2d 375 (U.S. 06/20/2002); Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed. 2d 728, 53 U.S. L.W. 4616 (1985). See also, Pa Association of Life Underwriters v. Foster, 645 A.2d 907, 165 Pa. Cmwlth. 596 (1994); Atlantic Health Care Benefits Trust v. Foster, 809 F. Supp. 365 (M.D. Pa.1992); Foster v. Health Market, Inc., 604 A.2d 1198, 146 Pa. Comwlth. 156 (1992); Foster v. West Branch Administrators, 597 A.2d 721, 724 (Pa. Cmwlth. 1991).

6. See 5, above.

7. See 5, above.

8. We cannot respond because we do not know what Voluntary Employee Beneficiary Association you are referring to. To the extent you mean to inquire about a VEBA created by REAL, see 5 above.

9. See 8, above. A VEBA is a trust under sec. 501(c)(9) of the Internal Revenue Code and does not have "officers" per se.

10. See 8, above. Moreover, we believe these documents to be protected by attorney-client privilege.

11. See 10, above. PennMont does not sponsor, establish, or maintain plans.

12. See 11 above.

12(e to g): Operating on a good faith belief in the authority described in 5 above, no form 5500s have been filed for REAL. No Form 5500 would be required if REAL is neither a plan nor a MEWA. There is no Form 5500 required for any employer who maintains a welfare benefit plan for less than 100 participants, Labor Regs. Sec. 2520104-41, or "the benefits of which are provided exclusively through insurance contracts issued by an insurance company or similar arrangement." Labor Regs. Sec. 2520.104-44. See also, Labor Regs. Sec. 2520104-26. Consequently, any employer who uses the form of plan like that would be exempt from filing form 5500. All of the welfare plan administration clients that are serviced by this firm use fully-insured arrangements and have less than 100 participants.

13. We are unable to discern whose fidelity bonds you are requesting.

14. Not applicable.

15. There is no "stop-loss coverage" as we understand that the meaning of that term. Bill Gray Enterprises, Inc. v. Gourley, 248 F.3d 206 (3d Cir. 2001) (definition of "stop loss insurance").

I asked you to disclose what individual prompted you to begin your inquiry. You have refused to disclose that information although I am entitled to it under the Freedom of Information Act and other law. There have been no "benefits" under any program that have been wrongfully denied or that are not fully-insured as required by the Pennsylvania Department of Insurance.

I ask you again to disclose why you have chosen to target my client for undue harassment when you are already aware of breaches of duty committed by the fiduciaries of both the Benistar 419 Plan and Severance Trust Executive Program. See, attached letter to U.S. Dept of Justice and DOL Solicitor Radzely. SANCHEZ & DANIELS v. Bursey, Carpenter, STEP, et al, No. 02-CV-8213 (E.D. Pa.); Arrow Drilling v. Benistar, et al, No. 02-CV-9097 (E.D. Pa.). I spoke to Fred Seigert of your office on February 10, 2003. On February 21, 2003 at 10:00a.m., I received a call from Jane Roller of the Philadelphia Office of DOL's Employee Benefit Security Administration (formerly PWBA) 215-861-5142. She said that she was responding to my email to Mr. Radzely and she was to be my contact. She said an investigator had been assigned to these matters.

We are well aware of DOL's interest in health insurance scams:

Multiple Employer Welfare Arrangements (MEWAs)

PWBA continues to focus its enforcement efforts on abusive and fraudulent MEWAs created by unscrupulous promoters who sell the promise of inexpensive health benefit insurance, but default on their obligations. MEWAs provide health benefits to employees of two or more unrelated employers who are not parties to bona fide collective bargaining agreements. They often provide lower cost alternatives to individual or single employer health care arrangements. However, these arrangements sometimes illegitimately seek to avoid state insurance requirements for reserves, contributions, mandated health benefits and other requirements applicable to insurance companies, thereby enabling the MEWA to market health benefits at substantially cheaper rates but without the protections contemplated by law.

Testimony of Assistant Secretary Ann L. Combs before the House Committee on Education and the Workforce, Subcommittee on Employer-Employee Relations, September 10, 2002

Our clients are not engaged in such activities and we have been active in assisting investigations of those who have been found by juries to have engaged in breaches of fiduciary duty. I don't know why you are bothering the "good guys."

I hope you now understand why we have become quite disturbed by this new unfounded inquiry and your persistence with giving the alleged accusation any credibility.

With all due respect, we see no reason for any visit by you on August 14, 2003, and therefore inform you that we are not agreeable to it.

The information conveyed in this letter is highly confidential. You are not authorized to disclose any particulars about my clients to any third party, even the persons who allegedly "complained."

Please contact us if we can be of further assistance.

Very truly yous,

John J. Koresko, V

JJK/
Enclosures

Koresko & Associates

A PROFESSIONAL COPORATION

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(610) 992-2200
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Attorneys
John J. Koresko, V
Jeanne D. Bonney

Certified Public Accountant
Also Admitted in Florida
Also Admitted in New Jersey

July 2, 2003

Bindu George, Investigator
Employee Benefits Security Administration
The Curtis Center – suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317

Re: Your letter of July 1

Dear Ms. George:

Further to my letter of this date, I enclose ERISA Advisory Opinion June 26, 2003 2003-08A. This letter discussed the Pennsylvania Automobile Association, which provided

welfare benefits to its members. I direct your attention to footnote on the last page under Mr. Campagna's signature:

> **For the purposes of this letter, we rely on your representation that the Association is a cognizable, bona fide group or association of employers within the meaning of section 3(5) of ERISA. We note, however, that if the Association in fact consists of unrelated employers that have executed participation agreements or similar documents merely as a means to fund benefits, in the absence of any genuine organizational relationship between the employers, no employer association would be recognized ,and the Trust would not be a plan within the meaning of section 3(1) of ERISA. See Advisory Opinion 2001-04A (Mar. 22, 2001).**

I believe this letter demonstrates the propriety of my argument that the Department of Labor does not have jurisdiction over the REAL organization or any arrangement of unrelated employers who execute participation agreements.

Please contact us if we can be of further assistance.

Very truly yours,

John J. Koresko, V

JJK/
Enclosures

APPENDIX M – DOCKET OF THE DISTRICT COURT, DATED JANUARY 24, 2006

United States District Court
Eastern District of Pennsylvania (Philadelphia)
CIVIL DOCKET FOR CASE #:2:04-mc-00074-MAM

Chao v. Koresko, et al.
Assigned to: Hon. Mary A. McLaughlin
Related Case: 2:05-mc-00018-MAM
Cause: 28:1331 Enforcement of Administrative Subpoena

Date Filed: 04/19/2004
Jury Demand: None
Nature of Suit: 111 Misc.
Jurisdiction: U.S Gov

Petitioner

Elaine L. Chao
Secretary of Labor
United States Dept. of Labor

represented by **Joan M. Roller**
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v.

Respondent

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Attorney to be noticed

Respondent

Delaware Valley League
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Date Filed	#	Docket Text
04/19/2004	1	Petition to Enforce Administrative Subpoenas by Elaine L. Chao, Memorandum, Declaration, Certificate of Service (mar,) (Entered: 04/19/2004)
04/20/2004	2	Order that a Hearing will be held in courtroom 3B on May 6, 2004, at 9:00 A.M. at which time respondents shall show cause why, if any, they should not be required to produce all of the documents requested in the attachments to the subpoenas. Signed by Judge Mary A. McLaughlin on 04/20/2004. 04/20/2004 entered and copies mailed. (ac,) (Entered: 04/20/2004).
04/27/2004	3	Entry of Appearance by Virginia I. Miller on

		behalf of Delaware Valley League, John J. Koresko V, Korseko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Certificate of Service, (ac,) (Entered: 04/27/2004)
04/30/2004	4	Affidavit of Service by Eloise Fulton Re: Served Order, Petition to enforce Administrative Subpoenas, Memorandum Declaration upon Respondents by Personal Service on 04/27/04. (ac,) (Entered: 04/30/2004)
05/05/2004	5	Lawyer Respondents' and Administrative Respondents' Response to the Department of Labor's Petition to Enforce Administrative Subpoena in an Investigation/adversary Proceeding to John J. Koresko, V, Esquire; Regional Employers' Assurance Leagues; Delaware Valley League; Penn-Mont Benefit Services, Inc; and the Law firm of Koresko & Associates, P.C. by Delaware Valley League, John J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Memorandum, Affidavits, Certificates of Services (ac,) Additional attachment(s) added on 5/6/2004 (ac,) (Entered: 05/06/2004)
05/06/2004	6	Petitioner's Motion to Quash Subpoena and Motion in Limine filed by Elaine L. Chao, Memorandum, Entry of Appearance, and Certificate of Service. (ac,) (Entered: 05/06/2004)
05/07/2004	7	Petitioner's Response in Opposition to Lawyer Respondents' and Administrative Respondents' Response to the Department of Labor's Petition to Enforce Administrative Subpoena in an Investigation/Adversary Proceeding to John J. Koresko, V, Esquire; Regional Employers' Assurance Leagues; Delaware Valley League; Penn-Mont Benefit

		Service, Inc. and the Law Firm of Koresko & Associates, P.C. by Elaine L. Chao. (ac,) (Entered: 05/07/2004).
05/07/2004	8	Petitioner's Motion to Strike portion of affidavit of Virginia I. Miller, Esq. filed by Elaine L. Chao, Memorandum, and Certificate of Service. (ac,) (Entered: 05/07/2004)
05/07/2004	9	Response to the Dept. of Labor's motion to quash subpoena and motion in limine filed by respondents' Delaware Valley League, John J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Affidavit, Certificate of Service. (gn,) (Entered: 05/10/2004)
05/10/2004	10	Corrected Copy of Exhibits to Lawyer Respondents' and Administrative Respondents' and Administrative Respondents' Response by Delaware Valley League, John J. Koresko V., Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues. (ac,) (Entered: 05/11/2004)
05/11/2004	11	Memorandum and Order that the Petition to enforce administrative subpoena is granted in part and held in abeyance in part; and the petitioner's motion to quash subpoena and motion in limine is granted for the reasons given in a memorandum of today's date. It is further ordered that the parties shall attempt to resolve the specific objections to the subpoenas by June 1, 2004. if they cannot resolve the dispute, they may present the dispute to the court, and the court will resolve the matter. Signed by Judge Mary A. McLaughlin on 05/11/04, 05/11/04 entered and copies mailed. Copies faxed by chambers. (ac,) Additional attachment(s) added on

		tered: 05/11/2004)
05/11/2004	12	Minute Entry for proceedings held before Judge Mary A. McLaughlin: Hearing to Show Cause held on 05/10/2004. Count's Holding – C.A.V. Court Reporter: ESR. (ac,) (entered: 05/14/2004)
05/18/2004	13	Transcript of Hearing held on 05/10/2004 before Judge McLaughlin. Court Reporter: ESR. (ac,) (Entered: 05/18/2004)
05/21/2004	14	Order that petitioner's Motion to Strike Portion of Affidavit of Virginia I. Miller is Denied as moot in Light of the Court's May 11, 2004 Memorandum and Order. Signed by Judge Mary A. McLaughlin on 05/21/04. 05/21/04 entered and copies mailed. (ac,) (entered: 05/21/2004)
05/21/2004	15	Response to Petitioner's to Motion to Strike Portion of Affidavit of Virginia I. Miller, Esquire, Certificate of Service, filed by Delaware Valley League, john J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues. (ac,) (Entered: 05/24/2004)
05/25/2004	16	Notice of Appeal as to Memorandum and order by Delaware Valley League, John J. Koresko V., Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues. Filing Fee $255, receipt number 400-905365. copies to Judge, Clerk USCA, Appeals Clerk and Natalie Appetta, Virginia I. Miller, Joan M. Roller, Certificate Service. (ac,) (entered: 05/26/2004)
05/25/2004	17	Clerk's Notice to USCA re: Notice of Appeal. (ac,) Additional attachment(s) added on 5/26/2004 (ac,). (entered: 05/26/2004)
06/01/2004		Notice of Docketing Record on Appeal from USCA re: Notice of Appeal, filed by Penn-

		Mont Benefit Services, Inc., John J. Koresko, Koresko & Associates, Regional Employers' Assurance Leagues, Delaware Valley League. USCA Case Number 04-2510 (ac,) (Entered: 06/01/2004)
06/02/2004	18	Status Report On Compliance with the Order of May 11, 2004 by Elaine L. Chao. (Attachments: #1 Exhibit A#2 Certificate of Service) (Thomasson, Linda) (entered: 06/02/2004)
06/03/2004	19	Order that the Hearing on outstanding issues scheduled from Monday, June 14, 2004, at 9:30 a.m. in courtroom 3-B before the Honorable Mary A. McLaughlin. Signed by Judge Mary A. McLaughlin on 06/04/04. 06/04/2004 entered and copies mailed. (ac,) (Entered: 06/04/2004)
06/04/2004	20	Order that the Hearing on Outstanding Issues scheduled for Monday, June 14, 2004, at 9:30 a.m. is rescheduled for Wednesday June 16, 2004 at 1:00 P.M. in Courtroom 3-B before the Honorable Mary A. McLaughlin. Signed By Judge Mary A. McLaughlin on 06/04/04. 06/04/04. (Entered and Copies Mailed. (ac,) (Entered: 06/04/2004).
06/10/2004	21	Statement Petitioner's Supplemental Brief in Support of her Motion for Enforcement of Administrative Subpoenas by Elaine L. Chao. (Attachments: #1 Exhibit) (Entered: 06/10/2004).
06/14/2004	22	Certificate of Service of Petitioner's Supplemental Brief in Support of her Motion for Enforcement of Administrative Subpoenas by Elaine L. Chao. (ac,) (Entered: 06/15/2004)
06/15/2004	23	Second Affidavit of Virginia I. Miller, Esquire in regard to privilege issues for enforcement of subpoenas by Delaware Valley League, John J. Koresko V, Koresko & Asso-

		ciates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Certificate of Service. (ac,) (Entered: 06/16/2004)
06/15/2004	24	Respondents' Motion for Certification for Interlocutory Appeal Pursuant to 28 U.S.C. 1292(b) filed by Delaware Valley League, John J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Memorandum of Law, Certificate of Service. (mac,) (Entered: 06:16/2004)
06/16/2005	25	Lawyer Respondents' and Administrative Respondents' Supplemental Memorandum of Law in Response to the Department of Labors' Petition to Enforce Administrative Subpoena in an Investigation/Adversary Proceeding to John J. Koresko, V, Esquire, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc; and the Law Firm of Koresko & Associates, P.C. by Delaware Valley League, John J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Certificate of Service. (ac,) (Entered: 06/17/2004)
06/16/2004	26	Third Affidavit of Virginia I. Miller, Esquire in Support of Response in Opposition to Enforcement of Subpoenas by Delaware Valley League, John J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Certificate of Service. (ac,) (Entered: 06/17/2004)
06/17/2004	27	Minute Entry for proceedings held before Judge Mary A. McLaughlin: Status Conference with Counsel on the Record held on

		06/16/04. Court Reporter: ESR. (ac,) (Entered: 06/17/2004)
06/17/2004	28	Praecipe for Entry of Appearance of Linda Thomasson on behalf of Petitioner Elaine L. Chao. (Attachments: #1 Certificate of Service) (Thomasson, Linda) Modified on 06/18/2004 (fh) (Entered: 06/17/2004)
06/18/2004	29	Order that Respondents' Motion for Certification for Interlocutory Appeal is denied. The Respondents shall produce a privilege log by July 19, 2004. The Court will then issue a final order in this matter. Signed by Judge Mary A. McLaughlin on 06/17/2004. 06/18/2004 entered and copies mailed. (ac,) (Entered: 06/18/2004)
06/22/2004	30	Copy of TPO Form re: Notice of Appeal. (ac,) (Entered: 06/22/2004)
06/28/2004	31	Plaintiff's Report on the Status of Respondent's Compliance with an Agreement Reached During the Conference on Jun 16, 2004 and Request for an Order Directing Compliance with the Agreement by Elaine L. Chao (Attachments: #1 Exhibit A #2 Certificate of Services) (Thomasson, Linda) Modified on 06/30/2004 (fh,). (Entered: 06/28/2004)
06/29/2004	32	Order that the Respondents shall respond to the plaintiff's report by Friday, July2, 2004. Signed by Judge Mary A. Mclaughlin on 06/29/2004. 06/29/2004. Entered and Copies mailed. (ac,) (Entered: 06/29/2004)
06/29/2004	33	Transcript of hearing held on 06/16/2004 before Judge McLaughlin. Court Reporter: ESR. (ac,) (Entered: 06/29/2004)
07/02/2004	34	Lawyer Respondents' and Administrative Respondents' Response to the Petitioner's Report Regarding the Review of the Sidney

		Charles Markets' Pleading Filed by Delaware Valley League, John J. Koresko V., Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Certificate of Service (ac,) (Entered:07/06/2004)
07/02/2004	35	Affidavit of Virginia I. Miller, Esquire, In Support of Response to Petitioner's Report of Review of Sidney Charles Markets' Pleading filed by Delaware Valley League, John J. Koresko, V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Certificate of Service. (Attachments: #1 Exhibit D)(ac,) (Entered: 07/06/2004)
07/09/2004	36	Affidavit of Jeanne Bonney, Esquire in Support of Respondents' Privilege Log in Response to the Department of Labor's Petition to enforce administrative subpoena in an investigation/adversary proceeding to John J. Koresko, V, Esq.; Regional Employers' Assurance Leagues; Delaware Valley League; Penn-Mont Benefit Services, Inc; and the Law firm of Koresko & Associates, P.C. by Delaware Valley League; John J. Koresko, V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Certificate of Service. (Exhibits A & B Privilege Log Attached (ac,) (Entered: 07/12/2004)
07/12/2004	37	Order that the Petitioner shall submit to the court by July 19, 2004, its position on the respondent's privilege log. Signed by judge Mary A. McLaughlin on 07/12/2004. 07/13/2004 entered and copies mailed. (ac,) (Entered: 07/13/2004)
07/19/2004	38	Notice by Elaine L. Chao Petitioner's Re-

		sponse to Respondent's Privilege Log (Appetta, Natalie) (Entered: 07/19/204)
07/20/2004	39	Order that the Respondents may reply to the Petitioner's Response to Respondent's Privilege Log by Monday, July26, 2004. The court will then promptly rule on the remaining issues in the Petition. Signed by judge Mary A. McLaughlin on 07/20/2004. 07/20//2004 Entered and copies mailed. Copies faxed by chambers. (ac,) (Entered: 07/27/2004)
07/26/2004	40	Reply to Petitioner's Response in Opposition to Lawyer Respondents' and Administrative Respondents' Privilege Binder and Log Responding to and In Opposition to the Petition to Enforce Administrative Subpoena by John J. Koresko, V. Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., and Koresko & Associates, Certificate of Service. (DT) (Entered: 07/27/2004)
08/02/2004	41	Memorandum and Order that the Petitioner shall respond to the questions raised in a Memorandum of Today's dated by August 10, 2004. The Respondents May reply August 17, 2004. Signed by Judge Mary A. McLaughlin on 07/27/2004.
08/06/2004	42	Statement Petitioner's Response to Questions Raised in the Memorandum and Order dated August 2, 2004 by Elaine L. Chao. (Attachments: #1 Certificate of Service) (Thomasson, Linda) (Entered: 08/06/2004)
08/17/2004	43	Reply of Lawyer Respondents and Administrative Respondents Pursuant to Court Order of August 2, 2004 Regarding Privilege Binder and Log Responding to and in Opposition to the Petition to Enforce Administrative Sub-

		poena by Delaware Valley League, John J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Certificate of Service. (ac,) (Entered:08/18/2004)
08/23/2004	44	Order that the Respondents shall comply with the subpoenas duces tecum issued by the secretary of labor on or before September 20, 2004, except that the respondents may redact bills from Anderson Kill & Olick, P.C. to delete attorney-client privileged or work product information, etc. Signed by Judge Mary A. McLaughlin on 08/23/2004. 08/23/2004 entered and copies mailed. (ac,) (Entered: 08/23/2004)
08/31/2004	45	Order of USCA as to Notice of Appeal by Penn-Mont Benefit Services, Inc., John J. Koresko, Koresko & Associates, Regional Employers' Assurance Leagues, Delaware Valley League that case is hereby dismissed for Failure to timely prosecute. (ac,) (entered: 09/01/2004)
09/03/2004	46	Motion for Clarification of the Order of August 23, 2004 filed by Elaine L. Chao. Brief, Certificate of Service. (Attachments: #1 Petitioners' Memorandum of Law in Support of Her Motion for Clarification of the Order of August 23, 2004 #2 Text of Proposed Order #3 Certificate of Service) (Thomasson, Linda) (Entered: 09/03/2004)
09/08/2004	47	Notice of Appeal as to Order of May 11, 2004 and August 2, 2004, Certificate of Service by Delaware Valley League, John J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues. Filing fee $ 255, receipt number 400 908613. Copies to Judge, Clerk

		USCA, Appeals Clerk and Natalie Appetta, Virginia I. Miller, Joan M. Roller, Linda D. Thomasson (ac), (Entered: 09/09/2004)
09/08/2004	48	Clerk's Notice to USCA re: Notice of Appeal. (ac,) Additional attachment(s) added on 9/9/2004 (ac,). (Entered: 09/09/2004)
09/20/2004	49	Response of Respondents (Lawyer Respondents and Administrative Respondents) in Opposition to Petitioner's Motion for Clarification of the Court's August 23, 2004 Order filed by Delaware Valley League, John J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues, Certificate of Service. (ac,) Additional attachment(s) added on 09/20/2004 (ac,) (Entered: 09/20/2004)
09/20/2004	50	Motion to Stay Pending appeal filed by Delaware Valley League, John J. Koresko V, Koresko & Associates, Penn-Mont Benefit Services, Inc., Regional Employers' Assurance Leagues. Memorandum, Certificate of Service (cw,) Additional attachment(s) added on 09/21/2004 (ac,) (Entered: 09/12/2004)
09/28/2004	51	Order that the Petitioner's Motion for Clarification of the Order of August 23, 2004 and the Respondent's Response in Opposition, it is hereby ordered that the motion is granted in part and denied in part. It is further ordered that, if the respondents redact information from the attorney billing records, the respondents must submit a detailed privilege log. The privilege log shall contain, at a minimum and for each redaction, the title or caption of the matter, a description of the subject matter, and a specific explanation of the basis for the redaction. At this time the court will not make a decision regarding the fiduciary ex-

		ception to the attorney-client and work product privileges. Such a decision would be premature because the respondent has not yet redacted documents that fall within this category. Signed by Judge Mary A. McLaughlin on 9/28/04. 09/28/04 Entered: 09/28/2004)
10/04/2004	52	Copy of TPO Form re: Notice of Appeal. (ac,) (Entered: 10/04/2004)
10/04/2004		Record Complete for Purposes of Appeal (ig,) (Entered: 10/04/2004)
10/21/2004	53	Response in Opposition re 50 Motion to Stay Pending appeal filed by Elaine L. Chao (Attachments: #1 Text of Proposed order #2 Certificate of Service) (Thomasson, Linda) (Entered: 10/04/2004)
10/21/2004	54	Order that Respondents' Motion to Stay pending appeal is denied. It is further ordered that the court's August 23, 2004, Order is stayed until November 12, 2004, to permit respondents to seek a stay pending appeal from the court of appeals. Signed by judge Mary A. McLaughlin on 10/20/2004. 10/21/2004 entered and copies mailed (ac,) (Entered: 10/21/2004)
11/15/2004	55	Motion for Contempt Motion for Adjudication of Civil Contempt filed by Elaine L. Chao. Memorandum, Certificate of Service. (Attachments: #1 Memorandum of Law in Support of Motion for Adjudication of Civil Contempt #2 Text of Proposed Order #3 Text of Proposed Order #4 Certificate of Service) (Thomasson, Linda) (Entered: 11/15/2004)
11/16/2004	56	Statement Related to Plaintiff's Motion for Adjudication of Civil Contempt: Letter of November 16, 2004 to the Honorable Mary A. McLaughlin by Elaine L. Chao. (Attachments: #1 Certificate of Service) (Thomasson,

		Linda) (Entered: 11/16/2004)
12/01/2004	57	Lawyer Respondents' and Administrative Respondents' Response to Petitioner's Motion for Adjudication of Civil Contempt filed by John J. Koresko, V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., Koresko & Associates, Certificate of Service. (ac,) (Entered: 12/02/2004)
12/06/2004	58	Order that Petitioner's Motion for Adjudication of Civil Contempt is denied without prejudice. Signed by Judge Mary A. McLaughlin on 12/06/12004. 12/06/2004 entered and copies emailed (ac,)(entered: 12/06/2004)
12/22/2004	59	Certified Copy of Order from USCA the Motion by Appellants to Stay order Pending Appeal is denied. (ac,) (Entered 12/22/2004)
12/23/2004	60	Motion Petitioner's Renewed Motion for Adjudication of Civil Contempt filed by Elaine L. Chao. Certificate of Service. (Attachments: #1 Certificate of Service) (Appetta, Natalie) (Entered: 12/23/2004)
12/28/2004	61	Order that the Respondents shall appeal before the Court on Friday, January 7, 2005 at 2:30 p.m. in courtroom 3-b to show cause why they should not be held in contempt for failure to comply with the court's August 23, 2004 order. Signed by Judge Mar A. McLaughlin on 12/28/2004. 12/29/2004 entered and copies emailed . Copies faxed by chambers 12/18/2004 (ac,) (Entered: 12/292004)
01/06/2005	62	Response in Opposition re 60 Motion Petitioner's Renewed Motion for Adjudication of Civil Contempt filed by John J. Koresko V, Regional Employers' Assurance Leagues,

		Delaware Valley League, Penn-Mont Benefit Services, Inc., Koresko & Associates, Certificate of Service. (Miller, Virginia) Modified on 1/7/2005 (np). (Entered: 01/06/2005)
01/10/2005	63	Order that the Petitioner's renewed motion for adjudication of civil contempt is denied without prejudice. It is further ordered that, if the court of appeals denies the respondents' petition for rehearing and rehearing en banc, the respondents must comply with the courts August 23, 2005 Order within 24 hours of receipt of notice of such denial. Signed by judge Mary A. McLaughlin on 1/10/05. 1/11/05 entered and copies emailed. (stb,) (Entered: 01/11/2005)
01/14/2005	64	Transcript of Proceedings held on 1/7/2005 before Judge McLaughlin. Court Reporter: R. Wolf (wgc,) (Entered: 1/14/2005)
02/08/2005	65	Exhibit Order dated January 24, 2005 (Government Exhibit 1) by Elaine L. Chao. (Attachments: #1 Exhibit Order dated January 24, 2005 (Government Exhibit 1) (Appetta, Natalie) (Entered: 02/08/2005)
02/09/2005	66	Notice of Appeal as to Order, Certificate of Service, by John J. Koresko V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, inc., Koresko & Associates. Filing fee $255, receipt number 400913553. Copies to Judge, Clerk USCA, Appeals Clerk and Virginia I. Miller, Joan M. Roller, Linda D. Thomasson, Natalie Appetta. (ac,) (Entered: 02/10/2005).
02/09/2005	67	Clerk's Notice to USCA re: Notice of Appeal. (ac,) Additional attachment(s) added on 2/10/2005 (ac,). (Entered: 02/10/2005)
02/15/2005	68	Motion for Contempt Incarceration of John J. Koresko, V , Filed by Penn-Mont Benefit Ser-

		Services, Inc. , John J. Koresko, V, Koresko & Associates, Regional Employers' Assurance Leagues, Delaware Valley League, USCA Case Number 05-1440 (ac,) (entered: 02/152005)
02/25/2005	69	Corrected Order to Show Cause filed by Elaine L. Chao, Certificate of Service. (Attachments: #1) (Appetta, Natalie) Modified on 3/1/2005 (np) (Entered: 02-25-2005)
02/25/2005	70	Order that the Respondents shall appear before the court on march 10, 2005, at 9:30 a.m. in courtroom 3-b to show cause why they should not be held in contempt for failure to comply with the court's January 10, 2005 order. The court will also hear argument on the petitioner's motion for incarceration of John J. koresko V. Signed by Judge Mary A. McLaughlin on 02/25/2005)
02/25/2005		Set/Reset Deadlines as to 68 Motion for Contempt Incarceration of John J. Koresko, V. Motion Hearing Set for 03/10/2005 09:30 am in the Courtroom before honorable Mary A. McLaughlin (ac,)(Entered: 02/28/2005)
03/01/2005	71	Order that the Hearing Scheduled for March 10, 2005, is rescheduled for march 16, 2005, at 11:00 a.m. in courtroom 3-B. Signed by Judge Mary A. McLaughlin on 02/28/2005. 02/28/2005 entered and copies emailed. (ac,) (Entered: 03/01/2005))
03/01/2005		Miscellaneous Hearing set for 03/16/2005 11:00 am in courtroom before honorable Mary A. McLaughlin. (ac) (Entered: 03/01/2005)
03/01/2005	72	Order that petitioner's motion to amend/correct motion for contempt incarceration of John J. Koresko, V is granted. Signed by judge Mary A. McLaughlin on

		03/01/2005. 03/01/2005 entered and copies emailed(ac) (entered: 03/01/2005)
03/1/2005	73	Opposition re 68 Motion for Contempt Incarceration of John J. Koresko, V (Affidavit of Virginia Miller in support of Opposition) filed by Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., Certificate of Services. (Attachments: #1, #2, #3, #4, #5, #6) (Miller, Virginia) Modified on 3/16/2005 (np.) (entered: 03/15/2005)
03/15/2005	74	Opposition re 68 Motion for Contempt Incarceration of John J. Koresko V, filed by John J. Koresko, V, Koresko & Associates, Certificate of Service. (Miller, Virginia) Modified on 3/16/2005 (np.) (entered: 03/15/2005)
03/15/2005	75	AFFIDAVIT in Support of Opposition re 68 Motion for Contempt Incarceration of John J. Koresko, V filed by John J. Koresko., V filed by John J. Koresko, V, Koresko & Associates. (Attachments: #1, #2, #3, #4, #5) (Miller, Virginia) Modified on 3/16/2005 (np) (Entered: 03/15/2005)
03/16/2005	76	Minute Entry for Hearing on Motion for Contempt Incarceration – C.A.V., held before Judge Mary A. McLaughlin. Court Reporter: /Ray Wolf. (pr,) (Entered:03/17/2005)
03/17/2005	77	Order that the Petitioner's Motion for Contempt incarceration of John J. Koresko, V. (Document No. 68) Has been taken under advisement. It is further ordered that respondents' John J. koresko, v. Penn-Mont Benefit Services, Inc., and Koresko & Associates, P.C. are Adjudged in Civil Contempt for failing to comply with the court's 08/23/2004 order requiring respondents to comply with the subpoena duces tecum issued by the peti-

		tioner on 01/28/2004, etc. signed by Judge Mary A. McLaughlin on 3/17/2005. 3/18/2005 entered and copies mailed. (jpd) (entered: 03/18/2005)
03/17/2005	78	Order that the Respondents John J. Koresko, V. , Penn-Mont Benefit Services, Inc. and Koresko & Associates, P.C. have been adjudged in civil contempt, the respondents must pay a coercive fine of $250.00 per day beginning on 01/26/2005 and continuing until such time as they comply with the directive of this court. Signed by judge Mary A. McLaughlin on 03/17/2005. 03/18/2005 entered and copies emailed (jpd) (Entered: 03/18/2005)
03/18/2005	79	Report of Petitioner's Fees and costs by Elaine L. Chao, Declaration, Certificate of Service. (Appetta, Natalie) Modified on 03/22/2005 (np). (Entered: 03/18/2005)
03/21/2005	80	Transcript of Hearing held on 03/16/2005 before Judge McLaughlin. Court Reporter: ESR (np). (Entered: 03/21/2005)
03/21/2005		The sum of $12,500.00 deposited into the Registry of the Court. (ac) (Entered: 03/21/2005)
03/23/2005	81	Notice of Appeal as to Order entered on March 17, 2005 by John J. Koresko, V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc. Koresko & Associates, Certificate of Service. Filing fee $255, receipt number 400914929. Copies to Judge, Clerk USCA, Appeals Clerk and Natalie Appetta, Virginia I. Miller, Joan M. Roller, Linda D. Thomasson (ac,) (Entered: 03/24/2005)
03/23/2005	82	Clerk's Notice to USCA re: Notice of Appeal. (ac,) (Entered: 03/24/2005)

03/29/2005		Notice of Docketing Record on Appeal from USCA re: Notice of Appeal, filed by Penn-Mont Benefit Services, Inc., John J. Koresko, V, Koresko & Associates, Regional Employers' Assurance Leagues, Delaware Valley League, USCA Case Number 05-1946. (ac,) (Entered: 03/29/2005)
04/00/2005	84	Record Complete for Purposes of Appeal (mar,) (Entered: 04/01/2005)
04/12/2005	85	Motion to Stay Pending Appeal filed by John J. Koresko, V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc, Koresko & Associates, Memorandum, Certificate of Service. (Miller, Virginia) Modified on 04/13/2005 (fh,) (entered: 04/12/2005)
04/20/2005	86	Response in Opposition re 85 Motion to Stay re 77 Order, 63 Order on Motion for Miscellaneous Relief, 78 Order, Opposition to Respondents' Motion to Stay Pending Appeals, filed by Elaine L. Chao, Certificate of Service. (Appetta, Natalie) Modified on 04/21/2005) (np) (Entered: 04/20/2005)
04/25/2005	87	Order that the respondents shall pay $5,312.50 to the Department of Labor on or before May 14, 2005. Signed by Judge Mary A. McLaughlin on 04/25/2005. 04/25/2005 entered and copies emailed. (ac,) (entered: 04/25/2005)
04/25/2005	88	Order that Respondents' Motion to Stay Pending appeal is denied, etc. signed by judge Mary A. McLaughlin on 04/25/2005. 04/26/2005 entered and copies emailed. (ac,) (Entered: 04/26/2005)
04/28/2005	89	Copy of TPO Form re: Notice of Appeal (ac,) (entered: 04/28/2005)
04/28/2005		Record Complete for Purposes of Appeal (fb)

		(Entered: 04/28/2005)
05/23/2005	90	Notice of Appeal as to Order by John J. Koresko, V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc. , Koresko & Associates, Certificate of Service. Filing fee $255, receipt number 400917220. Copies to Judge, Clerk USCA, Appeals Clerk and Virginia I. Miller, Joan M. Roller, Linda D. Thomasson, Natalie Appetta. (ac,) (Entered: 05/23/2005)
05/23/2005	91	Clerk's Notice to USCA re: Notice of Appeal. (ac,) (Entered: 05/23/2005)
06/16/2005	92	Notice of Appearance by Jocelyn A. Gabrynowicz on behalf of John J. Koresko, V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., Koresko & Associates with Certificate of Service (Gabrynowicz, Jocelyn) (Entered: 06/16/2005)
07/04/2005	93	Notice by Elaine L. Chao Request for Status Conference (Appetta, Natalie) (Entered: 07/01/2005)
07/06/2005	94	Notice by Elaine L. Chao re 93 Notice (Other) Amended Request for Status Conference (Appetta, Natalie) (Entered: 07/06/2005)
07/11/2005	95	Order that the Respondents shall appeal before the Court on July 21, 2005 at 3:00 pm in courtroom 3-b to show cause why John J. Koresko, V should not be incarcerated for failing to comply7 with the court's August 23, 2004 Order. Signed by Judge Mary a. McLaughlin on 07/11/2005. 07/12/2005 entered and copies emailed. (ac,) (Entered: 07/12/2005)
07/13/2005	96	Order that show cause hearing currently scheduled to take place on July 21, 2005 is rescheduled for August 12, 2005 at 9:30 a.m.

		in courtroom 3-b. signed by Judge Mary A. McLaughlin on 07/13/2005. 07/13/2005 entered and copies emailed (ac,) (Entered: 07/13/2005)
07/26/2005	97	Order that show cause hearing currently scheduled to take place on August 12, 2005 is Rescheduled for August 17, 2005 at 9:30 A.m. in courtroom 3-b. signed by Judge Mary A. McLaughlin on 07/25/2005. 07/26/2005 entered and copies emailed. (ac,) (Entered: 07/26/2005)
08/02/2005	98	Objections by Elaine L. Chao Letter Objection to Respondents Request to Postpone Hearing. (Appetta, Natalie) (Entered: 08/02/2005)
08/04/2005	99	Order that the show cause hearing currently scheduled to take place on 8/17/2005 is postponed and the court will reschedule the hearing at a later dated. Signed by judge Mary A. McLaughlin on 08/3/2005. 08/5/2005 entered and copies emailed (mbh,) (Entered: 08/05/2005)
08/16/2005	100	Certified Copy of Order from USCA that the Foregoing Motion for Stay of the Contempt Proceedings in the District Court is Granted Pending Resolution of Certain Appeals Currently pending in the Court. (ac,) (Entered: 08/16/2005)
10/28/2005	101	Notice of Appearance by Donald K. Neely on behalf of Elaine L. Chao with Certificate of Service(attachments #1 Certificate of Service) (Neely, Donald)(Entered: 10/28/2005)
12/28/2005	102	Order of USCA as to Notices of Appeal filed by Penn-Mont Benefit Services, Inc., John J. Koresko, V, Koresko & Associates, Regional Employers' Assurance Leagues, Delaware Valley League that the Orders of the District

		Court entered on August 23, 2004, January 11, 2005, March 18, 2005 and April 25, 2005, are hereby Affirmed. (ac,) (Entered: 12/28/2005)
12/30/2005	103	Statement Letter to schedule and hold a show cause hearing by Elaine L. Chao. (Neely, Donald) (Entered: 12/30/2005)
01/03/2006	104	Order that the Respondent shall appear before the Court on January 9, 2006 at 9:30 am, in courtroom 13-a to Show cause why John Koresko should not be incarcerated. Signed by Judge Mary A. McLaughlin. 01/04/2006 entered and copies emailed. (sc,) (Entered: 01/04/2006)
01/04/2006	105	Notice of Appearance by William H. Pillsbury on behalf of John J. Koresko, V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., Koresko & Associates with Certificate of Service (Pillsbury, William) (Entered 01/04/2006)
01/04/2006	106	Notice of Appearance by William H. Pillsbury on behalf of John J. Koresko, V, regional Employers; Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., Koresko & Associates with Certificate of Service (Pillsbury, William) (Entered: 01/04/2006)
01/04/2006	107	Notice of Appearance by Robert E. Frankel on behalf of John J. Koresko, V, Regional Employers' Assurance Leagues, Delaware Valey League, Penn-Mont Benefit services, Inc., Koresko & Associates with Certificate of Service (Frankel, Robert) (Entered: 01/04/2006)
01/05/2006	108	Motion to Stay Hearing to Show Cause filed by John J. Koresko, V, Regional Employers'

		Assurance League, Penn-Mont Benefit Services, Inc., Koresko & Associates. Memorandum, Certificate of Services. (Attachments: #1 Text of Proposed Order #2 Certificate of Service) (Pillsbury, William) (Entered: 01/05/2006)
01/05/2006	109	Order that the show cause hearing currently scheduled for January 9, 2006, is postponed until January 23, 2006 at 9:30 a.m. in courtroom 13-A, etc. signed by judge Mary A. McLaughlin on 01/05/2006. 01/05/2006 entered and copies emailed. Copies faxed by chambers.(ac,) (Entered: 01/05/2006)
01/20/2006	110	Memorandum of Law for the Hearing to Show Cause by John J. Koresko, V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., Koresko & Associates. (Attachments: #1 Certificate of Service #2 Exhibit A-C) (Pillsbury, William) (Entered: 01/20/2006)
01/23/2006	111	Certified Copy of Order from USCA that the Emergency Petition for Writ of Mandamus by John J. Koresko, Esq. is denied. (ac,) (Entered 01/23/2006)
01/24/2006	112	Minute Entry for proceedings held before Judge Mary A. McLaughlin: Show Cause Hearing held on 01/23/2006. Court Reporter: ESR (ac,) (Entered: 01/24/2006)
01/24/2006	113	Statement Letter to Judge McLaughlin by Elaine L. Chao. (Attachments: #1 Supreme Court Denial Letter) (Neely, Donald) (Entered: 01/24/2006)

APPENDIX N– PETITION TO ENFORCE SUBPOENA, DATED APRIL 19, 2004

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- -

Elaine L. Chao, Secretary Of Labor,United States Department Of Labor	:	
	:	Misc. Civ. Action No
Petitioner,	:	
v.	:	
John J. Koresko, V., Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc. and Koresko & Associates,	:	
Respondents.	:	

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PETITION TO ENFORCE ADMINSTRATIVE SUBPOENAS

Petitioner Elaine L. Chao, Secretary of Labor, United States Department of Labor, through her undersigned counsel, hereby asserts:

1. This action is brought to compel respondents, John J. Koresko, V. (Koresko), Regional Employers' Assurance Leagues ("REAL"), Delaware Valley League ("DVL"), Penn-Mont Benefit Services, Inc. ("Penn-Mont") and KOresko & Associates, collectively "Respondents" to comply with subpoenas *duces tecum* issued and directed to them by the Regional Director of the Philadelphia Region of the Employee Benefits Security Adminstration ("EBSA"), United States Department of Labor, in an investigation being conducted pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C § 1001 *et seq.* ("ERISA").

2. The Court has jurisdiction over this petition pursuant to section 9 of the Federal Trade Commission Act, 15 U.S.C § 49, as made applicable by section 504(c) of ERISA, 29 U.S.C § 1134(c), and pursuant to ERISA § 502(e)(l), 29 U.S.C. § 1132 (e)(l).

3. The Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Health and Welfare Benefit Plan, (the "Plan" or "Plans") is the subject of a fiduciary investigation being conducted pursuant to ERISA § 504(a), 29 U.S.C. § 1134(a). EBSA believes that REAL and/or Penn-Mont may have sponsored the Plan, as that term is define at 29 U.S.C. § 1002(16)(B)(i) and that the DVL may have been replaced by the REAL. EBSA also believes that Penn-Mont and/or the REAL may have delegated some authority with respect to the Plan to Koresko & Associates. Penn-Mont is the Plan Administrator, as that term is defined at 29 U.S.C. § 1002(16)(A). Koresko is the co-founder and President of Penn-Mont and President and owner of Koresko & Associates. Respondents are located at 200 West Fourth

Street, Bridgeport, PA, 19405. Accordingly, venue is proper pursuant to ERISA § 502(e), 29 U.S.C. § 1132(e)(2).

4. Bindu A. George, an Investigator with EBSA, has been conducting the investigation of the Plan to determine whether there are any violations to Title I of ERISA. (Declaration of Bindu A. George ("George Decl.") ¶ 2.)

5. On January 28, 2004, Mabel L. Capolongo, Regional Director for the Philadelphia Region of EBSA, issued subpoenas *duces tecum* to each of the five Respondents. True and correct copies of these subpoenas are attached as Exhibit A to the Declaration of Bindu A. George. The subpoenas requested that Respondents appear at 10:00 a.m. on March 9, 2004 at EBSA's Philadelphia Regional Office in Philadelphia, Pennsylvania, to produce records as identified in the attachments to the subpoenas. The subpoenas were served in person to John J. Koresko, V. by Ms. George and Senior Investigator Gerald Weslosky on February 4, 2004. Mr. Koresko was served with all five subpoenas at the address referenced above

6. On March 8, 2004, each of the five Respondents, through counsel, submitted to EBSA an "Objection to Subpoena in an Investigation/Adversary Proceeding...Dated February 4, 2004."

7. Between March 9 and April 2, 2004, Counsel for the Petitioner and Counsel for Respondents had serveral conversations and exchanged correspondence regarding the documents required to be produced pursuant to the subpoenas. To date, Respondents have failed to produce all of the required documents.

8. On April 6, 2004, Respondents provide only a certain, limited number of documents pertaining to one plan and one employer. The documents produced are available to the public. Respondents failed to produce the remainder of the documents responsive to the subpoenas.

9. Additionally, Respondents claim certain documents are privileged but have refused to produce a privilege log in accordance with the instructions on the subpoenas.

10. The issuance and service of the subpoenas at issue are authorized by section 504 of ERISA, which states in pertinent part:

> INVESTIGATIVE AUTHORITY
>
> (a) Investigation and submission of reports, books, etc.
>
> The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this title or any regulation or order thereunder –
>
> 1) to make an investigation, and in connection therewith to require the submission of reports, books, and records....
>
> (c) Other provisions applicable relating to attendance of witnesses and production of books, records, etc.
>
> For the purposes of any investigation provided for in this subchapter, the provision of sections 49 and 50 of Title 15 [the Federal Trade Commission

> Act, 15 U.S.C. §§49, 50][1] (relating to the attendance of witnesses, and the production of books, records and documents) are hereby made applicable (without regard to any limitation in such sections respecting persons, partnerships, banks, or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him...

29 U.S.C. § 1134(a)(1), (c)

WHEREFORE, for all the reasons set forth herein and in the accompanying Memorandum of Law, the Secretary of Labor respectfully requests that this Court issue an Order requiring Respondents to appear on a date certain to show

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[1] 15 U.S.C. § 49 authorizes the Federal Trade Commission, and by incorporation EBSA, to examine an copy documentation, and grants the agency:

> [the] power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation....
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

cause why they should not appear before the Employee Benefits Security Administration at such time and place as

Petitioner or the Court may set, to produce the records requested and grant Petitioner such other relief as may be necessary and appropriate.

Respectfully submitted,

Catherine Oliver Murphy
Regional Solicitor
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Howard M. Radzely
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Natalie A. Appetta
Attorney

US Department of Labor
Attorneys for Petitioner

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- -

Elaine L. Chao, Secretary Of Labor,United States Department Of Labor	:
	: Misc. Civ. Action No
Petitioner,	:
	:
	:
v.	:
John J. Koresko, V., Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc. and Koresko & Associates,	:
Respondents.	:

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MEMORANDUM OF LAW IN SUPPORT OF PETITION TO ENFORCE ADMINISTRATIVE SUBPOENAS

The Secretary of Labor ("Secretary") has filed her Petition to Enforce Adminstrative Subpoenas issued to Respondents pursuant to section 504 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1134. Section 504 gives the Secretary of Labor board authority to conduct investigations to determine whether any person has violated or is about to violate any provisions of Title I of ERISA or any

regulation or order issued under that Title. Section 504 provides in pertinent part:

> INVESTIGATIVE AUTHORITY
>
> (a) The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this title or any regulation or order thereunder –
>
> (1) to make an investigation, and in connection therewith to require the submission of reports, books, and records...
>
> * * *
>
> (c) For the purpose of an investigation provided for in this title, the provisions of Sections 9 and 10 (relating to the attendance of witnesses and the production of books, record, and documents) of the Federal Trade Commission Act (15 U.S.C. 49, 50) are hereby made applicable (without regard to any limitation in such sections respecting persons, partnerships, banks, or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him..

29 U.S.C. §1134(a)(1),(c).

Proceedings brought to enforce administrative subpoena such as these are summary in nature. *See Interstate Commerce Comm'n v. Gould,* 629 F.2d 847, 851 (3d Cir. 1980) *cert. denied,* 449 U.S. 1077 (1981); *NLRB v. Interstate Dress Carriers, Inc.,* 610 F.2d 99, 112 (3d Cir. 1979); *F.T.C. v. MacArthur,* 532 F.2d 1135, 1141 (7th Cir. 1976); *United States v. Newman,* 441 F.2d 165, 168-69 (5th Cir. 1971);

United States v. Witmer, 835 F.Supp.201, 205 (M.D. Pa 1993), *order vacated in part on reconsideration,* 835 F. Supp.208 (M.D. Pa. 1993) *aff'd,* 30 F.3d 1489 (3d Cir. 1994); EEOC v. *Universtiy of Pittsburgh,* 487 F. Supp. 1071, 1075 (W.D. Pa 1980), *aff'd,* 643 F.2d 983, *cert. denied,* 454 U.S. 880 (1981); *F.T.C. v. Carter,* 464 F.Supp. 633, 637 (D.D.C. 1979), *aff'd,* 636 F.2d 781 (D.C. Cir. 1980). The scope of the proceeding is narrow "because of the important governmental interest in the expeditious investigation of possible unlawful activity." *In re F.T.C. Line of Business Report Litigation,* 595 F.2d 685, 702-03 (D.C. Cir. 1978) (*citing F.T.C. v. Texaco, Inc.,* 555 F.2d 862, 872 (D.C. Cir.) (en banc), *cert denied,* 431 U.S. 974 (1977)). Compliance with a subpoena will be ordered if "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant" to the authorized inquiry. *United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950). *See also Dole v. Trinity Industries, Inc.,* 904 F.2d 867, 871 (3d Cir.), *cert denied,* 498 U.S. 998 (1990). When a government agency seeks documents from a private employer, the courts have broadly construed the notion of "relevance" of the information sought. In *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 509 (1943), where the Secretary of Labor sought enforcement of administrative subpoenas requesting information that "was not plainly incompetent or irrelevant to any lawful purpose of the Secretary...it was the duty of the distant court to order its production...." See also, *United States v. Oncology Services Corp.,* 60 F.3d 1015, 1019 (3d. Cir. 1995) *citing Dole v. Trinity Industries, Inc.* 904 F.2d at 872 *quoting Endicott Johnson Corp.,* 317 U.S. 501 (1943). The Supreme Court later established the requirements for enforcement of an ad-

ministrative subpoena in *Morton Salt,* where it stated that "[w]hen investigative...duties are delegated by statute to an administrative agency" -- as they are to the Secretary in ERISA -- "it...may take steps to inform itself as to whether there is probable violation of the law." 338 U.S. at 643. Thus, the Secretary is not required to show that a law has been violated before seeking enforcement of a subpoena. *See Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 208-09 (1946) (for administrative subpoena to be to be valid, "[i]t is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command"); *Donovan v. Shaw,* 668 F.2d 985 (8th Cir. 1982) (no need to show that law has been violated in proceeding to enforce administrative subpoena issued pursuant to ERISA).

Respondents may argue that the Plan or Plans involved in the subject investigation may not be covered by ERISA or that the Employee Benefits Security Administration ("EBSA") does not have the authority to investigate coverage. Such argument however is without merit, for "[t]he 'authority to investigate the existence of violations...include(s) authority to investigate coverage.'" *Donovan v. Shaw,* at 989; *see also Brock v. United Maintenance Service, Inc., et al.* 1986 WL 8478 *2 (N.D.Ill.)(Department of Labor may investigate companies or individuals to determine coverage under ERISA), *citing Donovan v. Shaw* at 986; *Marshall v. Amalgamated Insurance Agency Services,* 2 EBC 2288 (N.D.Ill 1980). Thus, it is well-settled that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under ERISA. *Id.,* at 989 (citations omitted). Accordingly, such an issue cannot be

resolved until the agency has had an opportunity to examine the records. *Id.*, (citations omitted).

The petitioner may make his *prima facie* case through affidavits. *Marshall v. Amalgamated Insurance Agency Services, Inc.*, 523 F.Supp. 231, 233 (N.D.Ill. 1981) (enforcement of administrative subpoena issued pursuant to ERISA); *See also, United States v. Witmer*, 835 F.Supp. at 221 (Court acknowledging use of affidavits by agency in making prima facie case for enforcement of subpoena). Once the petitioner has made a *prima facie* showing of statutory authority, legitimate purpose, and reasonable relevance, the burden shifts to the respondent to provide compelling reasons why the subpoena should not be enforced. *Shaw*, 668 F.2d at 989; *Amalgamated*, 523 F. Supp. at 233. *See also United States v. Powell*, 379 U.S. 48, 57-58 (1964) (reasons offered by respondents to prevent enforcement of Internal Revenue Service subpoenas insufficient to show "abuse of process").

Since subpoenas allow the Department to fulfill its investigation burden, to invalidate a subpoena is to question the power of Congress to delegate enforcement of federal laws. *See Oklahoma Press Publishing*, 327 U.S. at 201; *Missouri Pacific Employees Hospital Assoc. v. Donovan*, 576 F. Supp. 208, 212-13 (E.D. Mo. 1983), *aff'd*,745 F.2d 1174 (8th Cir. 1984). Moreover, ERISA should be constructed to grant maximum protection to employee benefit plans. *Brink v. DaLesio*, 667 F.2d 420, 427 (4th Cir.1981).

The standards for enforcing the subpoenas have clearly been met in the instant investigation. First, Investigator Bindu A. George states in her Declaration, under penalty of

perjury, that the EBSA's investigation was initiated pursuant to ERISA § 504 to determine if any person has or is about to violate any provision of Title I of ERISA. [George Declaration ("Decl.") ¶2]. The subpoenas, which are attached as Exhibit A to the George Declaration expressly indicate on their face that they were issued in connection with an investigation undertaken pursuant to the Secretary's statutory powers under ERISA. Second, the request for documents, and the date and location that the documents were to be produced, are clearly stated in the subpoenas, satisfying *Morton Salt's* definiteness requirement. Lastly, the documents Respondents have not produced to date are all relevant and necessary so that EBSA can complete its investigation of the Plan. [George Decl. ¶9].

The documents not produced to date consist of documents identifying all employers or Plans which have adopted a prototype plan and/or participate in Voluntary Employees Beneficiary Associates Trusts ("VEBA" or "Trust"), documents related to the individual Plans and Trusts and their establishment, operation, contractual relationships and finances. Such documents requested and not produced to date are more fully detailed in the attachments to the subpoenas which are attached to the Declaration of Bindu. A.; George. To date, only a very limited number of documents were produced in response to the subpoenas issued to Respondents. [George Decl. ¶¶ 6-7]. Specifically, the documents provided related solely to one plan or employer and consisted of: an affidavit of respondents' attorney in another unrelated matter, Jeanne D. Bonney, and supporting exhibits which include one application for membership, one Plan document, one Adoption agreement, one Trust Agreement and some corresponding

relating only to the REAL (formerly DVL) VEBA for the Sidney Charles Markets, Inc. Plan and no other employers, plans or trusts. Moreover, these documents are publicly available. No other documents responsive to the subpoenas were produced.

Finally, as Respondents claim certain documents responsive to the subject subpoenas are privileged, to date, they have failed to identify in a privilege log or otherwise, the alleged privileged documents and the nature of each privilege. [George Decl. ¶ 8]. The party asserting the privilege must establish essential elements of the privilege. *See, United States v. Construction Products Research,* 73 F.3d 464, 473 (2d Cir. 1996)(citations omitted). "To facilities its determination of privilege, a court may require "an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps," *Id. citing Bowne of New York City Inc. v. AmBase Corp.,* 150 F.R.D. 465, 474 (S.D.N.Y. 1993). If therefore, Respondents claim that any of the documents responsive to the subpoenas are privileged, they must convince this Court of the correctness of their position.

Indeed, PWBA's investigation of the Plan cannot continue until Respondents produce the above-referenced documents. [George Decl. ¶ 9]. These facts satisfy the final requirement under *Morton Salt:*

> To require a more specific recital of the purposes for which this investigation is being conducted...would, in practical effect, force the DOL to reveal its investigation plan. Nothing in the

> Constitution, ERISA or other case law require that DOL [be so specific].

Amalgamated, 523 F.Supp. at 234. *See also Trinity Industries,* 904 F.2d at 874 ("It is enough that the information sought is relevant to any inquiry that the Secretary is authorized by law to undertake....").

Petitioner thus has made a *prima facie* showing of her statutory authority, the legitimate purpose behind the investigation, and the relevancy of the documents subpoenaed. The burden, therefore, rests upon Respondents to show compelling reason why the subpoenas should not be enforced. As Respondents have not and cannot show any such compelling reasons, the subpoenas should be enforced.

Respectfully submitted,

Howard M. Radzely
Solicitor of Labor

Catherine Oliver Murphy
Regional Solicitor

Catherine Oliver Murphy
Regional Solicitor
Office of the Solicitor
The Curtis Center
Suite 630E
170 S. Independence Mall W
Philadelphia, PA 19106-3306
(215) 861-5126

Natalie A. Appetta
Attorney

U.S. Department Of Labor
Attorneys for Petitioner

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Elaine L. Chao, Secretary Of Labor,United States Department Of Labor	:	
	:	Misc. Civ. Action No
Petitioner,	:	
v.	:	
John J. Koresko, V., Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc. and Koresko & Associates,	:	
Respondents.	:	

DECLARATION OF BINDU A. GEORGE

1. My name is Bindu A. George and I am an Investigator in the Philadelphia, PA Regional Office of the Employee Benefits Security Adminstration ("EBSA"), United States Department of Labor.

2. I have been assigned to conduct an investigation of the Regional Employers' Assurance Leagues Voluntary Em

ployees' Beneficiary Association Health and Welfare Benefit Plan, (the "Plan" or "Plans") to determine whether any violations of Title I of the Employee Retirement Income Security Act of 1974 have occurred or are about to occur.

3. On January 28, 2004, Mabel L. Capolongo, Regional Director for the Philadelphia Region of the EBSA, issued subpoenas *duces tecum* to John J. Koresko, V., ("Korseko"), the Regional Employers' Assurance Leagues ("REAL"), Delaware Valley League ("DVL"), Penn-Mont Benefit Services, Inc. ("Penn-Mont") and Koresko & Associations, collectively "Respondents." The subpoenas requested certain documents pertaining to the establishment, contractual relationships, operation and finances of the Plans and the Voluntary Employees' Beneficiary Association ("VEBA") Trusts. The subpoenas requested that Respondents appear at 10:00 a.m. on March 9, 2004 at EBSA's Philadelphia Regional Office in Philadelphia, Pennsylvania, to produce records as identified in the attachments to the subpoenas.

4. Prior to February 4, 2004, I attempted to informally and without subpoenas, obtain documents pertinent to my investigation from Mr. Koresko. However, Mr. Koresko was uncooperative and refused to provide any documents.

5. On February 4, 2004, EBSA Senior Investigator Gerald Weslosky and I served each of the subpoenas in person to Koresko, at 200 West Fourth Street, Bridgeport, PA 19405, Penn Mont's and Koresko & Associations' principal place of business. At that time Koresko accepted service of the subpoenas and I completed the "Return of Service" and "Certification of Compliance" portions of the subpoenas. True and correct copies of the subpoenas, their attachments

and corresponding Returns of Service and Certifications of Compliance are attached hereto as Government Exhitbit No. A.

6. On April 6, 2004, I received responses to the subpoenas from Respondents. Respondents produced only a limited number of documents, all of which are publicly available.

7. I have reviewed the limited number of documents provided by Respondents on April 6, 2004. The documents provided relate solely to one plan or employer which is apparently in litigation with several respondents and consist of an affidavit of respondents' attorney in the other litigation, Jeanne D. Bonney, and supporting exhibits which include an application for membership, a Plan document, an Adoption agreement, a Trust Agreement and some corresponding relating only to the REAL (formerly DVL) VEBA for only the Sidney Charles Markets, Inc. Plan and no other employers, plans or trusts. No other documents responsive to the subpoenas have been provided to date.

8. Additionally, each of the subpoenas requires that Respondents identify certain information if they assert that any documents required to be produced are withheld because of a claim privilege. To the extent that Respondents have asserted a claim of privilege in its Objections with respect to any documents, to date, no privilege log has been provided.

9. My investigation cannot continue until I receive the documents specifically outlined in the attachments to the five subpoenas.

10. I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on 4/15/04

Bindu A. George

U.S. Department of Labor

Employee Benefits Security Administration
Philadelphia Regional Office
The Curtis Center – Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317
Phone: (215) 861-5300
Telefax: (215) 861-5347

February 4, 2004

Mr. John J. Koresko, V.
200 West Fourth Street
Bridgeport, Pennsylvania 19405

Re: Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Health and Welfare Benefit Plan

Dear Mr. Koresko:

This office is conducting an investigation of the above-referenced employee benefit plan pursuant to Section 504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1134(a)(1), to determine whether any persons has violated or is about to violate any provision of Title 1 of ERISA.

Accompanying this letter is subpoena duces tecum directed towards you requiring the production of certain specified documents. These documents are necessary and relevant to the above-referenced investigation. If any documents called for are not furnished, please list such documents and indicate

their location and the reason for non-production. Your personal appearance pursuant to this subpoena will not be required, provided the documents as required in the subpoena are produced.

If you have any questions, please contact Investigator Bindu A. George at (215) 861-5314, on or before February 24, 2004. In the absence of any expressly agreed alternative procedure, we will expect full compliance with the subpoena at the time and place indicated therein.

Sincerely,

Mabel L. Capolongo
Regional Director
Philadelphia Region
Enclosure

SUBPOENA
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
Employee Benefits Security Administration

To: ***John J. Koresko, V.***
200 West Fourth Street
Bridgeport, Pennsylvania 19405

You are hereby required to appear before Investigator Bindu A. George of the Employee Benefits Security Administration, U.S. Department of Labor, at 170 S. Independence Mall West, Suite 870 West, in the City of Philadelphia, on ***the 9th day of March 2004 at 10:00 a.m.*** *of that day, to testify in the matter of an investigation of*

Regional Employer's Assurance Leagues Voluntary Employees' Beneficiary Association Plan

being conducted pursuant to Section 504 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1134, in order to determine whether any person has violated or is about to violate any provision of Title I of ERISA or any regulation or order thereunder;

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: See attached.

Fail not at you peril

In testimony where I *have hereunto affixed my signature and the seal of the* ***United States Department of Labor*** *in Silver Spring, Maryland this____ day of January 2004*

_____

MABEL L. CAPOLONGO, REGIONAL DIRECTOR

ATTACHMENT TO SUBPOENA
FOR
JOHN J. KOREKO, V.

A. Definition and Instructions

1. The term "employee benefit plans" shall mean an employee pension benefit plan as defined in section 3(2)(A) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1002(1) and sections related thereto or an employee welfare benefit plan as defined in section 3(1) of ERISA and sections related thereto.

2. The term "Plans" shall mean all employee benefit plans sponsored, established, administered or maintained by Penn-Mont Benefit Services, Inc.

3. The term "Penn-Mont" shall mean the Penn-Mont Benefit Services, Inc. and any predecessor, successor, subsidiary or affiliate corporation.

4. The term "DVL" shall mean the Delaware Valley League and any predecessor, successor, subsidiary or affiliate organization.

5. The term "REAL" shall mean the Regional Employers' Assurance League and any predecessor, successor, subsidiary or affiliate organization.

6. The term "VEBA Trusts" shall mean all Voluntary Employees Beneficiary Associations Trusts created by, sponsored by or otherwise related to the DVL, REAL or Penn-Mont including VEBA Trust established by employ-

ers or plan sponsors who use the services and/or products of the DVL, REAL or Penn-Mont or who participate, use are members of the DVL or REAL.

7. The term "service provider" shall mean any person or entity providing services to the DVL, REAL, Penn-Mont or the VEBA Trusts.

8. The term "document" or "documents" means "writings" or "recordings" within the meaning of Section 1001 of the Federal Rules of Evidence, consisting of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. Such documents shall include all such writings or recordings, of every kind and regardless of where located, which are within your possession, custody, or control, or the possession, custody, or control of any agent, employee, representative, or other persons acting or purporting to act for or on your behalf, including, but not limited to, contracts, agreements, correspondence, memoranda, reports, plan amendments, plan resolution, letters, notices, authorizations, ledger books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, work papers, notes, drafts, copies, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, reports or summaries of negotiations, marginal notations, bills, invoices, checks, bank statements, lists, journals, computer tapes and cards, and all other written, printed, recorded or photographic matter or sound reproduction, however produced or reproduced.

9. The term "relating to" means constituting, referring to, pertaining to, or containing any information which in any way concerns, affects, or describes the terms or conditions, or identifies facts, with respect to the subject of the injury.

10. The words "and" and "or" shall be constructed conjunctively or disjunctively as necessary to make the request inclusive rather exclusive. The use of the word "including" shall be constructed to mean "without limitation."

11. The term "communications" shall mean or refer to all inquires, agreements, understandings, meeting, telephone conversations, letters, notes, telegrams, telexes, cable advertisements, computer programs, diskettes, electronic mail system, and other forms of verbal intercourse, whether oral or written.

12. The term "fiduciary" shall have the same meaning as such term has under section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C §1002(21), and sections and regulations related thereto.

13. If any document required to be produced pursuant to this subpoena is withheld because of a claim of privilege, identify with respect to each document:

a. the specific privilege being asserted;
b. the nature of the document, e.g., letter, memorandum;
c. the author of the document and the date it was prepared;

d. the recipient of the document and all individuals who received copies of it;

e. the subject matter of the document.

14. Unless otherwise specified, the time period covered by this request is from January 1, 2000 to the final date of production. Documents created prior to January 1, 2000, but which have been used or relied on since January 1, 2000, or which describe legal duties which remain in effect after January 1, 2000 (such as contracts and agreements), shall be produced in response to this request.

B. Documents to Be Produced:

1. All documents concerning Penn-Mont and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of Penn-Mont including the names of the individuals, their title or positions, and the length of time in that position;

b. All documents prepared, executed or used to establish and administer or operate Penn-Mont;

c. All documents relating to the type of products or services offered or performed by Penn-Mont;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by Penn-Mont; and

e. All documents identifying the names and addresses of every employer or plan sponsor that has established, adopted or participates in any group benefits plan or program identified in a document produced in response to paragraph 1(d) above.

2. All documents concerning the DVL and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of the DVL including the names of the individuals, their titles or position, and the length of time in that position;

b. All documents prepared, executed or used to establish and administer or operate the DVL;

c. All agreements, contracts, memoranda of understanding and other such documents reflecting or containing any agreement between the DVL and any service providers, employee benefit plans, employers or labor organizations;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by DVL; and

e. All documents identifying the names and addresses of every employer that has established, adopted or participates in any group health plan or program identified in a document produced in response to paragraph 2(d).

3. All documents concerning the REAL and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of the REAL including the names of the individuals, their titles or positions, and the length of time in that positions

b. All documents prepared, executed or used to establish and administer or operate the REAL; and telephone number of the service provider; and (iii) length of their service with each plan. Such goods and/or services include, but are not limited to, accounting, auditing, administrative, appraisal, consulting, banking, brokerage, investment, advisory, investment management, insurance and legal;

k. The fidelity bond for each of the VEBA Trust, including but not limited to the declaration page and loss pay over rider, and documents identifying the VEBA Trust as a named insured and specifying the amount of coverage and name of surety company;

l. Fiduciary liability policy for any fiduciary of the VEBA Trust, including but not limited to declaration page and loss pay over rider, and documents identifying the Plan as a named insured and specifying the amount of coverage and name of insurance company; and

m. Documents identifying all persons who control, direct or exercise any authority over or on behalf of any VEBA Trust which should include (i) the names of the persons, (ii) addresses, (iii) position or title and (iv) length of time in that position.

5. For each Plan that is a member of, participates in, contributes to, uses, has established, maintains or is otherwise related to the VEBA Trusts identified in paragraph 4 and its subparts above, provide:

a. All documents relating to the Plans including, but not limited to, any amendments and any prototype documents and amendments;

b. All documents relating to the trust agreements;

c. All documents relating to the signed adoption agreements;

d. All documents relating to the Summary Plan Descriptions;

e. Documents identifying the names and address of all participants in the Plans;

f. All documents relating to bank records, including but not limited to, account signature card files, deposit slips, checks, wire transfers, monthly statements, current account information, cash management account agreements and correspondence regarding the accounts.

g. All documents relating to billing participants or employers of participants, including but not limited to, invoices, correspondence, copies of client checks and computerized records;

h. All documents relating to premium payments made to insurance carriers including the basis for the premium charged or credited;

i. All documents relating to amounts of commissions, premium taxes, charges for risk or contingencies, other retention charges, reserve charges and other expenses charged or chargeable by insurance carriers;

j. All documents relating to claims adjudication, including but not limited to, claims submitted, claims approved, computerized records, correspondence, records of claims paid and unpaid and submission to re-insurers or stops loss insurers;

k. All documents relating to expenses paid by the VEBA Trusts for administrative expenses (including service provider fees), benefits claims and daily operations;

l. Documents identifying all bank accounts in the name of the Plans or for the benefit of the Plans;

m. Signed copies of the filed Form 5500 or 5500 C/R for years 2000-2002 (Annual Return/Report of Employee Benefit Plans) with all attachments as required (e.g. Schedules A, B, C, independent public accountant's report, the auditor's opinion and financial statement) or if not applicable the Form M1 filing;

n. Summary Annual Reports for 2000-2002;

o. All documents which identify all individuals or business entities that provide goods and/or services during the last five years including (i) the names of the individuals or business entities; (ii) the most recent address and telephone number of the service provider; and (iii)length of their service with each plan. Such goods and/or services include, but are not limited to, accounting, auditing, administrative, appraisal, consulting, banking, brokerage, investment, advisory, investment management, insurance and legal;

p. The fidelity bond for each of the Plans, including but not limited to, declaration page and loss pay over rider, and documents identifying the VEBA Trust or Plan as a named insured and specifying the amount of coverage and name of surety company;

q. Fiduciary liability policy for any fiduciary of the Plan, including but not limited to, declaration page and loss pay over rider, and documents identifying the Plan as a named insured and specifying the amount of coverage and name of surety company;

r. All documents relating to insurance policies held by the Plans.

Return of Service

I hereby certify that the original of the within subpoena was duly served on the person named herein.

(Check method used)

[ ] *in person*

[ ] *by certified or registered mail*

[ ] *other (specify)*_____

[ ] *by leaving at principal office or place of business, to wit:*

on _____
(Month, day, year)

_____
(Name of person making service)

_____
(Official Title)

Certification of Compliance

I certify that the person named herein was in attendance as a witness and/or produced the records requested herein at

_____

_____

on

_____
(Month, day, year)

_____
(Name of person certifying)

U.S. Department of Labor

Employee Benefits Security Administration
Philadelphia Regional Office
The Curtis Center – Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317
Phone: (215) 861-5300
Telefax: (215) 861-5347

February 4, 2004

Regional Employers' Assurance Leagues
200 West Fourth Street
Bridgeport, Pennsylvania 19405

Re: Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Health and Welfare Benefit Plan

Dear Sir or Madam:

This office is conducting an investigation of the above-referenced employee benefit plan pursuant to Section 504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1134(a)(1), to determine whether any persons has violated or is about to violate any provision of Title 1 of ERISA.

Accompanying this letter is a subpoena duces tecum directed towards the Regional Employers' Assurance Leagues requiring the production of certain specified documents. These

documents are necessary and relevant to the above-referenced investigation. If any documents called for are not furnished, please list such documents and indicate their location and the reason for non-production. Your personal appearance pursuant to this subpoena will not be required, provided the documents as required in the subpoena are produced.

If you have any questions, please contact Investigator Bindu A. George at (215) 861-5314, on or before February 24, 2004. In the absence of any expressly agreed alternative procedure, we will expect full compliance with the subpoena at the time and place indicated therein.

Sincerely,

Mabel L. Capolongo
Regional Director
Philadelphia Region

Enclosure

SUBPOENA
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
Employee Benefits Security Administration

To: ***Regional Employers' Assurance Leagues***
200 West Fourth Street
Bridgeport, Pennsylvania 19405

You are hereby required to appear before Investigator Bindu A. George of the Employee Benefits Security Administration, U.S. Department of Labor, at 170 S. Independence Mall West, Suite 870 West, in the City of Philadelphia, on ***the 9th day of March 2004 at 10:00 a.m.*** *of that day, to testify in the matter of an investigation of*

Regional Employer's Assurance Leagues Voluntary Employees' Beneficiary Association Plan

being conducted pursuant to Section 504 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1134, in order to determine whether any person has violated or is about to violate any provision of Title I of ERISA or any regulation or order thereunder;

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: See attached.

Fail not at you peril.

In testimony where I *have hereunto affixed my signature and the seal of the* ***United States Department of Labor*** *in Silver Spring, Maryland this____ day of January 2004*

_____

_____

MABEL L. CAPOLONGO, REGIONAL DIRECTOR

ATTACHMENT TO SUBPOENA
FOR
REGIONAL EMPLOYERS' ASSURANCE LEAGUES

A. Definitions and Instructions

1. The term "employee benefit plans" shall mean an employee pension benefit plan as defined in section 3(2)(A) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1002(1) and sections related thereto or an employee welfare benefit plan as defined in section 3(1) of ERISA and sections related thereto.

2. The term "Plans" shall mean all employee benefit plans sponsored, established, administered or maintained by Penn-Mont Benefit Services, Inc.

3. The term "Penn-Mont" shall mean the Penn-Mont Benefit Services, Inc. and any predecessor, successor, subsidiary or affiliate corporation.

4. The term "DVL" shall mean the Delaware Valley League and any predecessor, successor, subsidiary or affiliate organization.

5. The term "REAL" shall mean the Regional Employers' Assurance League and any predecessor, successor, subsidiary or affiliate organization.

6. The term "VEBA Trusts" shall mean all Voluntary Employees Beneficiary Associations Trusts created by, sponsored by or otherwise related to the DVL, REAL or Penn-Mont including VEBA Trusts established by employers or plan sponsors who use the services and/or products of the

DVL, REAL or Penn-Mont or who participate, use are members of the DVL or REAL.

7. The term "service provider" shall mean any person or entity providing services to the DVL, REAL, Penn-Mont or the VEBA Trusts.

8. The term "document" or "documents" means "writings" or "recordings" within the meaning of Section 1001 of the Federal Rules of Evidence, consisting of letters, words or numbers, or their equivalent, set down by handwriting typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. Such documents shall include all such writings or recordings, of every kind and regardless of where located, which are within your possession, custody, or control, or the possession, custody, or control of any agent, employee, representative, or other persons acting or purporting to act for or on your behalf, including, but not limited to contracts, agreements, correspondence, memoranda, reports plan amendments, plan resolutions, letters, notices, authorizations, ledger books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, work papers, notes, drafts, copies graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, reports or summaries of negotiations, marginal notations, bills, invoices, checks, bank statements, lists, journals, computer tapes and cards, and all other written, printed, recorded or photographic matter or sound reproduction, however produced or reproduced.

9. The term "relating to" means constituting, referring to pertaining to, or containing any information which in any

way concerns, affects, or describes the terms or conditions, or identifies facts, with respect to the subject of the inquiry.

10. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather exclusive. The use of the word "including" shall be construed to mean "without limitation."

11. The term "communications" shall mean or refer to all inquires, agreements, understandings, meetings, telephone conversations, letters, notes, telegrams, telexes, cable advertisements, computer programs, diskettes, electronic mail system, and other forms of verbal intercourse, whether oral or written.

12. The term "fiduciary" shall have the same meaning as such term has under section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C §1002(21), and sections and regulations related thereto.

13. If any document required to be produced pursuant to this subpoena is withheld because of a claim of privilege, identify with respect to each document:

a. the specific privilege being asserted;

b. the nature of the document, e.g., letter, memorandum;

c. the author of the document and the date it was prepared;

d. the recipient of the document and all individuals who received copies of it;

e. the subject matter of the document.

14. Unless otherwise specified, the time period covered by this request is from January 1, 2000 to the final date of production. Documents created prior to January 1, 2000, but which have been used or relied on since January 1, 2000, or which describe legal duties which remain in effect after January 1, 2000 (such as contracts and agreements), shall be produced in response to this request.

B. <u>Documents to Be Produced</u>:

1. All documents concerning Penn-Mont and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of Penn-Mont including the names of the individuals, their title or positions, and the length of time in that position;

b. All documents prepared, executed or used to establish and administer or operate Penn-Mont;

c. All documents relating to the type of products or services offered or performed by Penn-Mont;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by Penn-Mont; and

e. All documents identifying the names and addresses of every employer or plan sponsor that has established adopted or participates in any group benefits plan or program identified in a document produced in response to paragraph 1(d) above.

2. All documents concerning the DVL and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of the DVL including the names of the individuals, their titles or positions, and the length of time in that positions;

b. All documents prepared, executed or used to establish and administer or operate the DVL;

c. All agreements, contracts, memoranda of understanding and other such documents reflecting or containing any agreement between the DVL and any services providers, employee benefit plans, employers or labor organizations;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by DVL; and

e. All documents identifying the names and addresses of every employer that has established, adopted or participates in any group health plan or program identified in a document produced in response to paragraph 2(d).

3. All documents concerning the REAL and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of the REAL including the names of the individuals their titles or positions, and the length of time in that positions;

b. All documents prepared, executed or used to establis and administer or operate the REAL;

c. All agreements, contracts, memoranda of understandin and other such documents reflecting or containing an agreement between the REAL and any service providers employee benefit plans, employers or labor organizations;

d. All documents relating to the sales, marketing, advertis ing and promotion of group health, accident, life insur ance, dental, vision and prescription benefit plans o programs by REAL; and

e. All documents identifying the names and addresse every employer that has established, adopted or partici pates in any group health plan or program identified in document produced in response to paragraph 3(d).

4. All documents prepared, executed or used to establish administer or operate the VEBA Trusts including;

a. All documents identifying the names and address o every employer that is a member of, participates in, con tributes to, uses, has established, maintains or sponsors VEBA Trust and the name of the VEBA Trust established

b. All documents identifying the trustees of any VEB Trusts identified in paragraph 4(a), which should includ the names of the trustees, addresses and the length of tim in that position;

c. Minutes of any Board of Trustee, Administrative Com mittee or other pertinent meetings concerning the VEB Trusts;

d. Documents identifying the names and addresses of all participants in the VEBA Trusts;

e. All documents utilized in enrolling or the joining of employers in any of the VEBA Trusts;

f. All documents relating to insurance policies held by the VEBA Trusts;

g. All documents relating to assets held by the VEBA Trusts;

h. All documents of all of the VEBA Trusts relating to expenses paid by the VEBA Trusts for administrative expenses (including service provider fees), benefits claims and daily operations;

i. Documents identifying all bank accounts in the name of the VEBA Trusts or for the benefit of the VEBA Trusts;

j. All documents which identify all individuals or business entities that provide goods and/or services to any VEBA Trusts during the last five years including (i) the names of the individuals or business entities; (ii) the most recent address and telephone number of the service provider; and (iii) length of their service with each plan. Such goods and/or services include, but are not limited to, accounting, auditing, administrative, appraisal, consulting, banking, brokerage, investment, advisory, investment management, insurance and legal;

k. The fidelity bond for each of the VEBA Trusts, including but not limited to declaration page and loss payover rider, and documents indentifying the VEBA Trust as a

named insuraed and specifying the amount of coverag and name of surety company;

l. Fiduciary liability policy for any fiduciary of the VEBA Trusts, including but not limited to declaration page an loss pay over rider, and documents identifying the Plan a a named insured and specifying the amount of coverag and name of insurance company; and

m. Documents identifying all persons who control, direc or exercise any authority over or on behalf of any VEBA Trust which should include (i) the names of the persons (ii) addresses, (iii) position or title and (iv) length of tim in that position.

5. For each Plan that is a member of, participates in, contrib utes to, uses, has established, maintains or is otherwise re lated to the VEBA Trusts identified in paragraph 4 and it subparts above, provide:

a. All documents relating to the Plans including, but no limited to, any amendments and any prototype document and amendments;

b. All documents relating to the trust agreements;

c. All documents relating to the signed adoption agree ments;

d. All documents relating to the Summary Plan Descrip tion;

e. Documents identifying the names and address of all par ticipants in the Plans;

f. All documents relating to bank records, including but not limited to, account signature card files, deposit slips, checks, wire transfers, monthly statements, current account information, cash management account agreements and correspondence regarding the accounts.

g. All documents relating to billing participants or employers of participants, including but not limited to, invoices, correspondence, copies of client checks and computerized records;

h. All documents relating to premium payments made to insurance carriers including the basis for the premium charged or credited;

i. All documents relating to amounts of commissions, premium taxes, charges for risk or contingencies, other retention charges, reserve charges and other expenses charged or chargeable by insurance carriers;

j. All documents relating to claims adjudication, including but not limited to, claims submitted, claims approved, computerized records, correspondence, records of claims paid and unpaid and submissions to re-insurers or stop loss insurers;

k. All documents relating to expenses paid by the VEBA Trusts for administrative expenses (including service provider fees), benefits claims and daily operations;

l. Documents identifying all bank accounts in the name of the Plans or for the benefit of the Plans;

m. Signed copies of the filed Form 5500 or 5500 C/R for years 2000-2002 (Annual Return/Report of Employee

Benefit Plans) with all attachments as required (e.g. Schedules A,B, C, independent public accountant's report, the auditor's opinion and financial statement) or if not applicable the Form M1 filing;

n. Summary Annual Reports for 2000-2002;

o. All documents which identify all individuals or business entities that provide goods and/or services during the last five years including (i) the names of the individuals or business entities; (ii) the most recent address and telephone number of the service provider; and (iii) length of their service with each plan. Such goods and/or services include, but are not limited to, accounting, auditing, administrative, appraisal, consulting, banking, brokerage, investment, advisory, investment management, insurance and legal;

p. The fidelity bond for each of the Plans, including but not limited to, declaration page and loss payover rider, and documents identifying the VEBA Trust or Plan as a named insured and specifying the amount of coverage and name of surety company;

q. Fiduciary liability policy for any fiduciary of the Plan including but not limited to, declaration page and loss pay over rider, and documents identifying the Plan as a named insured and specifying the amount of coverage and the name of the insurance company; and

r. All documents relating to insurance policies held by the Plans.

Return of Service

I hereby certify that the original of the within subpoena was duly served on the person named herein.

(Check method used)

[ ] *in person*

[ ] *by certified or registered mail*

[ ] *other (specify)*_____

[ ] *by leaving at principal office or place of business, to wit*

on

_____
(Month, day, year)

_____
(Name of person making service)

_____
(Official Title)

Certification of Compliance

I certify that the person named herein was in attendance as a witness and/or produced the records requested herein at

_____

_____
(Month, day, year)

_____

(Name of person certifying)

U.S. Department of Labor

Employee Benefits Security Administration
Philadelphia Regional Office
The Curtis Center – Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317
Phone: (215) 861-5300
Telefax: (215) 861-5347

February 4, 2004

Delaware Valley League
200 West Fourth Street
Bridgeport, Pennsylvania 19045

Re: Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Health and Welfare Benefit Plan

Dear Sir or Madam:

This office is conducting an investigation of the above referenced employee benefit plan pursuant to Section 504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1134(a)(1), to determine whether any persons has violated or is about to violate any provision of Title 1 of ERISA.

Accompanying this letter is subpoena duces tecum directed towards Delaware Valley League requiring the production of certain specified documents. These documents are necessary and relevant to the above-referenced investigation. If any

documents called for are not furnished, please list such documents and indicate their location and the reason for non-production. Your personal appearance pursuant to this subpoena will not be required, provided the documents as required in the subpoena are produced.

If you have any questions, please contact Investigator Bindu A. George at (215) 861-5314, on or before February 24, 2004. In the absence of any expressly agreed alternative procedure, we will expect full compliance with the subpoena at the time and place indicated therein.

Sincerely,

Mabel L. Capolongo
Regional Director
Philadelphia Region
Enclosure

SUBPOENA
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
Employee Benefits Security Administration

To: ***Delaware Valley League***
200 West Fourth Street
Bridgeport, Pennsylvania 19405

You are hereby required to appear before Investigator Bindi A. George of the Employee Benefits Security Administration U.S. Department of Labor, at 170 S. Independence Mal West, Suite 870 West, in the City of Philadelphia, on ***the 9th day of March 2004 at 10:00 a.m.*** *of that day, to testify in the matter of an investigation of*

Regional Employer's Assurance Leagues Voluntary Employees' Beneficiary Association Plan

being conducted pursuant to Section 504 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1134, in order to determine whether any person has violated or is about to violate any provision of Title of ERISA or any regulation or order thereunder;

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: See attached.

Fail not at you peril.

In testimony where I *have hereunto affixed my signature and the seal of the* ***United States Department of Labor*** *in Silver Spring, Maryland this____ day of January 2004*

MABEL L. CAPOLONGO, REGIONAL DIRECTOR

ATTACHMENT TO SUBPOENA
FOR
DELAWARE VALLEY LEAGUE

A. Definitions and Instructions

1. The term "employee benefit plans" shall mean an em ployee pension benefit plan as defined in section 3(2)(A) o the Employee Retirement Income Security Act of 1974 (ER ISA), 29 U.S.C. Section 1002(1) and sections related theret or an employee welfare benefit plan as defined in sectio 3(1) of ERISA and sections related thereto.

2. The term "Plans" shall mean all employee benefit plan sponsored, established, administered or maintained by Penn Mont Benefit Services, Inc.

3. The term "Penn-Mont" shall mean the Penn-Mont Benefi Services, Inc. and any predecessor, successor, subsidiary o affiliate corporation.

4. The term "DVL" shall mean the Delaware Valley Leagu and any predecessor, successor, subsidiary or affiliate or ganization.

5. The term "REAL" shall mean the Regional Employers Assurance League and any predecessor, successor, subsidi ary or affiliate organization.

6. The term "VEBA Trusts" shall mean all Voluntary Em ployees Beneficiary Associations Trusts created by, spon sored by or otherwise related to the DVL, REAL or Penn Mont including VEBA Trust established by employers o plan sponsors who use the services and/or products of the

DVL, REAL or Penn-Mont or who participate, use are members of the DVL or REAL.

7. The term "service provider" shall mean any person or entity providing services to the DVL, REAL, Penn-Mont or the VEBA Trusts.

8. The term "document" or "documents" means "writings" or "recordings" within the meaning of Section 1001 of the Federal Rules of Evidence, consisting of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. Such documents shall include all such writings or recordings, of every kind and regardless of where located, which are within your possession, custody, or control, or the possession, custody, or control of any agent, employee, representative, or other persons acting or purporting to act for or on your behalf, including, but not limited to, contracts, agreements, correspondence, memoranda, reports, plan amendments, plan resolutions, letters, notices, authorizations, ledger books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, work papers, notes, drafts, copies, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, reports or summaries of negotiations, marginal notations, bills, invoices, checks, bank statements, lists, journals, computer tapes and cards, and all other written, printed, recorded or photographic matter or sound reproduction, however produced or reproduced.

9. The term "relating to" means constituting, referring to, pertaining to, or containing any information which in any

way concerns, affects, or describes the terms or conditions or identifies facts, with respect to the subject of the injury.

10. The words "and" and "or" shall be construed conjunc tively or disjunctively as necessary to make the request in clusive rather exclusive. The use of the word "including' shall be construed to mean "without limitation."

11. The term "communications" shall mean or refer to al inquires, agreements, understandings, meetings, telephon conversations, letters, notes, telegrams, telexes, cable adver tisements, computer programs, diskettes, electronic mail sys tem, and other forms of verbal intercourse, whether oral o written.

12. The term "fiduciary" shall have the same meaning a such term has under section 3(21) of the Employee Retire ment Income Security Act of 1974 (ERISA), 29 U.S.(§1002(21), and sections and regulations related thereto.

13. If any document required to be produced pursuant to thi subpoena is withheld because of a claim of privilege, iden tify with respect to each document:

a. the specific privilege being asserted;

b. the nature of the document, e.g., letter, memorandum

c. the author of the document and the date it was pre pared;

d. the recipient of the document and all individuals wh received copies of it;

e. the subject matter of the document.

14. Unless otherwise specified, the time period covered by this request is from January 1, 2000 to the final date of production. Documents created prior to January 1, 2000, but which have been used or relied on since January 1, 2000, or which describe legal duties which remain in effect after January 1, 2000 (such as contracts and agreements), shall be produced in response to this request.

B. <u>Documents to Be Produced</u>:

1. All documents concerning Penn-Mont and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of Penn-Mont including the names of the individuals, their title or positions, and the length of time in that position;

b. All documents prepared, executed or used to establish and administer or operate Penn-Mont;

c. All documents relating to the type of products or services offered or performed by Penn-Mont;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by Penn-Mont; and

e. All documents identifying the names and addresses of every employer or plan sponsor that has established, adopted or participates in any group benefits plan or program identified in a document produced in response to paragraph 1(d) above.

2. All documents concerning the DVL and its organization structure, operation and purpose including, but not limitec to:

a. All documents identifying the directors and officers of the DVL including the names of the individuals, their titles or positions, and the length of time in that positions;

b. All documents prepared, executed or used to establishec and administer or operate the DVL;

c. All agreements, contracts, memoranda of understanding and other such documents reflecting or containing any agreement between the DVL and any services providers employee benefit plans, employers or labor organizations;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans o programs by DVL; and

e. All documents identifying the names and addresses o every employer that has established, adopted or participates in any group health plan or program identified in a document produced in response to paragraph 2(d).

3. All documents concerning the REAL and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers o the REAL including the names of the individual, their titles or positions, and the length of time in that positions;

b. All documents prepared, executed or used to establish and administer or operate the REAL;

c. All agreements, contracts, memoranda of understanding and other such documents reflecting or containing any agreement between the REAL and any service providers, employee benefits plans, employers or labor organizations;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by REAL; and

e. All documents identifying the names and addresses every employer that has established adopted or participates in any group health plan or program identified in a document produced in response to paragraph 3(d).

4. All documents prepared, executed or used to establish, administer or operate the VEBA Trust including;

a. All documents identifying the names and address of every employer that is a member of, participates in, contributes to, uses, has established, maintains or sponsors a VEBA Trust and the name of the VEBA Trust established;

b. All documents identifying the trustees of any VEBA Trusts identified in paragraph 4(a), which should include the names of the trustees, addresses and the length of time in that position;

c. Minutes of any Board of Trustee, Administrative Committee or other pertinent meetings concerning the VEBA Trusts;

d. Documents identifying the names and addresses of all participants in the VEBA Trusts;

e. All documents utilized in enrolling or the joining of employers in any of the VEBA Trusts;

f. All documents relating to insurance policies held by the VEBA Trusts;

g. All documents relating to assets held by the VEBA Trusts;

h. All documents of all of the VEBA Trusts relating to expenses paid by the VEBA Trusts for administrative expenses (including service provider fees), benefits claims and daily operations;

i. Documents identifying all bank accounts in the name of the VEBA Trusts or for the benefit of the VEBA Trusts;

j. All documents which identify all individuals or business entities that provide goods and/or services to any VEBA Trusts during the last five years including (i) the names of the individuals or business entities; (ii) the most recent address and telephone number of the service provider; and (iii) length of their service with each plan Such goods and/or services include, but are not limited to accounting, auditing, administrative, appraisal, consulting banking brokerage, investment, advisory, investment management, insurance and legal;

k. The Fidelity bond for each of the VEBA Trusts, including but not limited to declaration page and loss payove rider, and documents the VEBA Trusts as named insured

and specifying the amount of coverage and name of surety company.

l. Fiduciary liability policy for any fiduciary of the VEBA Trust, including but not limited to declaration page and loss payover rider, and documents identifying the Plan as a named insured and specifying the amount of coverage and name of insurance company; and

m. Documents identifying all persons who control, direct or exercise any authority over or on behalf of any VEBA Trust which should include (i) the names of the persons, (ii) addresses, (iii) position or title and (iv) length of time in that position.

5. For each Plan that is a member of, participates in, contributes to, uses, has established, maintains or is otherwise related to the VEBA Trusts identified in paragraph 4 and its subparts above, provide:

a. All documents relating to the Plans including, but not limited to, any amendments and any prototype documents and amendments;

b. All documents relating to the trust agreements;

c. All documents relating to the signed adoption agreements;

d. All documents relating to the Summary Plan Description;

e. Documents identifying the names and address of all participants in the Plans;

f. All documents relating to bank record, including but not limited to, account signature card files, deposit slips checks, wire transfers, monthly statements, current account information, cash management account agreements and correspondence regarding the accounts.

g. All documents relating to billing participants or employers of participants, including but not limited to, invoices, correspondence, copies of client checks and computerized records;

h. All documents relating to premium payments made to insurance carriers including the basis for the premium charged or credited;

i. All documents relating to amounts of commissions premium taxes, charges for risk or contingencies, other retention charges, reserve charges and other expenses charged or chargeable by insurance carriers;

j. All documents relating to claims adjudication, including but not limited to, claims submitted, claims approved computerized records, correspondence, records of claims paid and unpaid and submissions to re-insurers or stop loss insurers;

k. All documents relating to expenses paid by the VEBA Trusts for administrative expenses (including service provider fees), benefits claims and daily operations;

l. Documents identifying all bank accounts in the name of the Plans or for the benefit of the Plans;

m. Signed copies of the filed Form 5500 or 5500 C/R for years 2000-2002 (Annual Return/Report of Employee

Benefit Plans) with all attachments as required (e.g. Schedules A,B, C, independent public accountant's report, the auditor's opinion and financial statement) or if not applicable the Form M1 filing;

n. Summary Annual Reports for 2000-2002;

o. All documents which identify all individuals or business entities that provide goods and/or services during the last five years including (i) the names of the individuals or business entities; (ii) the most recent address and telephone number of the service provider; and (iii) length of their service with each plan. Such goods and/or services include, but are not limited to, accounting, auditing, administrative, appraisal, consulting, banking, brokerage, investment, advisory, investment management, insurance and legal;

p. The fidelity bond for each of the Plans, including but not limited to, declaration page and loss payover rider, and documents identifying the VEBA Trust or Plan as a named insured and specifying the amount of coverage and name of surety company;

q. Fiduciary liability policy for any fiduciary of the Plan, including but not limited to, declaration page and loss payover rider, and documents identifying the Plan as a named insured and specifying the amount of coverage and the name of the insurance company; and

r. All documents relating to insurance policies held by the Plans.

Return of Service

I hereby certify that the original of the within subpoena wa: duly served on the person named herein.

(Check method used)

[ ] *in person*

[ ] *by certified or registered mail*

[ ] *other (specify)*_____

[ ] *by leaving at principal office or place of business, to wit:*

on _____

(Month, day, year)

_____

(Name of person making service)

_____

(Official Title)

Certification of Compliance

I certify that the person named herein was in attendance as witness and/or produced the records requested herein at

_____

_____

(Month, day, year)

_____

(Name of person making service)

U.S. Department of Labor

Employee Benefits Security Administration
Philadelphia Regional Office
The Curtis Center – Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317
Phone: (215) 861-5300
Telefax: (215) 861-5347

February 4, 2004

Penn-Mont Benefit Services, Inc.
200 West Fourth Street
Bridgeport, Pennsylvania 19045

Re: Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Health and Welfare Benefit Plan

Dear Sir or Madam:

This office is conducting an investigation of the above-referenced employee benefit plan pursuant to Section 504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1134(a)(1), to determine whether any persons has violated or is about to violate any provision of Title 1 of ERISA.

Accompanying this letter is subpoena duces tecum directed towards Penn-Mont Benefit Service, Inc. requiring the production of certain specified documents. These documents are necessary and relevant to the above-referenced investigation. If any documents called for are not furnished, please list such documents and indicate their location and the reason for non-production. Your personal appearance pursuant to this subpoena will not be required, provided the documents as required in the subpoena are produced.

If you have any questions, please contact Investigator Bindu A. George at (215) 861-5314, on or before February 24 2004. In the absence of any expressly agreed alternative procedure, we will expect full compliance with the subpoena at the time and place indicated therein.

Sincerely,

Mabel L. Capolongo
Regional Director
Philadelphia Region

Enclosure

SUBPOENA
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
Employee Benefits Security Administration

To: ***Penn-Mont Benefit Services, Inc.***
200 West Fourth Street
Bridgeport, Pennsylvania 19405

You are hereby required to appear before Investigator Bindu A. George of the Employee Benefits Security Administration, U.S. Department of Labor, at 170 S. Independence Mall West, Suite 870 West, in the City of Philadelphia, on ***the 9th day of March 2004 at 10:00 a.m.*** *of that day, to testify in the matter of an investigation of*

Regional Employer's Assurance Leagues Voluntary Employees' Beneficiary Association Plan

Being conducted pursuant to Section 504 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1134, in order to determine whether any person has violated or is about to violate any provision of Title I of ERISA or any regulation or order thereunder;

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: See attached.

Fail not at you peril.

***In testimony where I** have hereunto affixed my signature and the seal of the **United States Department of Labor** in Silver Spring, Maryland this____ day of January 2004*

MABEL L. CAPOLONGO, REGIONAL DIRECTOR

ATTACHMENT TO SUBPOENA
FOR
PENN-MONT BENEFIT SERVICES, INC.

A. Definitions and Instructions

1. The term "employee benefit plans" shall mean an employee pension benefit plan as defined in section 3(2)(A) of the Employee Retirement Income Security Act of 1074 (ERISA), 29 U.S.C. Section 1002(1) and sections related thereto or an employee welfare benefit plan as defined in section 3(1) of ERISA and sections related thereto.

2. The term "Plans" shall mean all employee benefit plans sponsored, established, administered or maintained by Penn-Mont Benefit Services, Inc.

3. The term "Penn-Mont" shall mean the Penn-Mont Benefit Services, Inc. and any predecessor, successor, subsidiary or affiliate corporation.

4. The term "DVL" shall mean the Delaware Valley League and any predecessor, successor, subsidiary or affiliate organization.

5. The term "REAL" shall mean the Regional Employers' Assurance League and any predecessor, successor, subsidiary or affiliate organization.

6. The term "VEBA Trusts" shall mean all Voluntary Employees Beneficiary Associations Trusts created by, sponsored by or otherwise related to the DVL, REAL or Penn-Mont including VEBA Trust established by employers or plan sponsors who use the services and/or products of the

DVL, REAL or Penn-Mont or who participate, use are members of the DVL or REAL.

7. The term "service provider" shall mean any person or entity providing services to the DVL, REAL, Penn-Mont or the VEBA Trusts.

8. The term "document" or "documents" means "writings" or "recordings" within the meaning of Section 1001 of the Federal Rules of Evidence, consisting of letters, words or numbers, or their equivalent, set down by handwriting typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. Such documents shall include all such writings or recordings, of every kind and regardless of where located, which are within your possession, custody, or control, or the possession, custody, or control of any agent, employee, representative, or other persons acting or purporting to act for or on your behalf, including, but not limited to contracts, agreements, correspondence, memoranda, reports plan amendments, plan resolution, letters, notices, authorizations, ledger books, summaries or records of telephone conversations, summaries or records of personal conversation or interviews, work papers, notes, drafts, copies, graphs charts, accounts, analytical records, minutes or records of meetings or conferences, reports or summaries of negotiations, marginal notations, bills, invoices, checks, bank statements, lists, journals, computer tapes and cards, and all other written, printed, recorded or photographic matter or sound reproduction, however produced or reproduced.

9. The term "relating to" means constituting, referring to pertaining to, or containing any information which in any

way concerns, affects, or describes the terms or conditions, or identifies facts, with respect to the subject of the inquiry.

10. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather exclusive. The use of the word "including" shall be construed to mean "without limitation."

11. The term "communications" shall mean or refer to all inquires, agreements, understandings, meeting, telephone conversations, letters, notes, telegrams, telexes, cable advertisements, computer programs, diskettes, electronic mail system; and other forms of verbal intercourse, whether oral or written.

12. The term "fiduciary" shall have the same meaning as such term has under section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C §1002(21), and sections and regulations related thereto.

13. If any document required to be produced pursuant to this subpoena is withheld because of a claim of privilege, identify with respect to each document:

a. the specific privilege being asserted;

b. the nature of the document, e.g., letter, memorandum;

c. the author of the document and the date it was prepared;

d. the recipient of the document and all individuals who received copies of it;

e. the subject matter of the document.

14. Unless otherwise specified, the time period covered by this request is from January 1, 2000 to the final date of production. Documents created prior to January 1, 2000, but

which have been used or relied on since January 1, 2000, or which describe legal duties which remain in effect after January 1, 2000 (such as contracts and agreements), shall be produced in response to this request.

B. Documents to Be Produced:

1. All documents concerning Penn-Mont and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of Penn-Mont including the names of the individuals, their title or positions, and the length of time in that position;

b. All documents prepared, executed or used to establish and administer or operate Penn-Mont;

c. All documents relating to the type of products or services offered or performed by Penn-Mont;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by Penn-Mont; and

e. All documents identifying the names and addresses of every employer or plan sponsor that has established adopted or participates in any group benefits plan or program identified in a document produced in response to paragraph 1(d) above.

2. All documents concerning the DVL and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of the DVL including the names of the individuals, their titles or positions, and the length of time in that positions;

b. All documents prepared, executed or used to established and administer or operate the DVL;

c. All agreements, contracts, memoranda of understanding and other such documents reflecting or containing any agreement between the DVL and any services providers, employee benefit plans, employers or labor organizations;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by DVL; and

e. All documents identifying the names and addresses of every employer that has established, adopted or participates in any group health plan or program identified in a document produced in response to paragraph 2(d).

3. All documents concerning the REAL and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of the REAL including the names of the individual, their titles or positions, and the length of time in that positions;

b. All documents prepared, executed or used to establish and administer or operate the REAL;

c. All agreements, contracts, memoranda of understanding and other such documents reflecting or containing any agreement between the REAL and any service providers employee benefits plans, employers or labor organizations;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans o programs by REAL; and

e. All documents identifying the names and addresses every employer that has established adopted or participates in any group health plan or program identified in a document produced in response to paragraph 3(d).

4. All documents prepared, executed or used to establish administer or operate the VEBA Trust including;

a. All documents identifying the names and address o every employer that is a member of, participates in, contributes to, uses, has established, maintains or sponsors VEBA Trust and the name of the VEBA Trust established

b. All documents identifying the trustees of any VEBA Trusts identified in paragraph 4(a), which should includ the names of the trustees, addresses and the length of tim in that position;

c. Minutes of any Board of Trustee, Administrative Committee or other pertinent meetings concerning the VEBA Trusts;

d. Documents identifying the names and addresses of all participants in the VEBA Trusts;

e. All documents utilized in enrolling or the joining of employers in any of the VEBA Trusts;

f. All documents relating to insurance policies held by the VEBA Trusts;

g. All documents relating to assets held by the VEBA Trusts;

h. All documents of all of the VEBA Trusts relating to expenses paid by the VEBA Trusts for administrative expenses (including service provider fees),benefits claims and daily operations;

i. Documents identifying all bank accounts in the name of the VEBA Trusts or for the benefit of the VEBA Trusts;

j. All documents which identify all individuals or business entities that provide goods and/or services to any VEBA Trusts during the last five years including (i) the names of the individuals or business entities; (ii) the most recent address and telephone number of the service provider; and (iii) length of their service with each plan. Such goods and/or services include, but are not limited to, accounting, auditing, administrative, appraisal, consulted, banking brokerage, investment, advisory, investment management, insurance and legal;

k. The Fidelity bond for each of the VEBA Trusts, including but not limited to declaration page and loss payover rider and documents identifying the VEBA Trusts as a

named insured and specifying the amount of coverage and name of surety company

l. Fiduciary liability policy for any fiduciary of the VEBA Trust, including but not limited to declaration page and loss payover rider, and documents identifying the Plan as

a named insured and specifying the amount of coverage and name of insurance company; and

m. Documents identifying all persons who control, direct or exercise any authority over or on behalf of any VEBA Trust which should include (i) the names of the persons (ii) addresses, (iii) position or title and (iv) length of time in that position.

5. For each Plan that is a member of, participates in, contributes to, uses, has established, maintains or is otherwise related to the VEBA Trusts identified in paragraph 4 and its subparts above, provide:

a. All documents relating to the Plans including, but not limited to, any amendments and any prototype documents and amendments;

b All documents relating to the trust agreements;

c. All documents relating to the signed adoption agreements;

d. All documents relating to the Summary Plan Description;

e. Documents identifying the names and address of all participants in the Plans;

f. All documents relating to bank record, including but not limited to, account signature card files, deposit slips, checks, wire transfer, monthly statements, current account information, cash management account agreements and correspondence regarding the accounts.

g. All documents relating to billing participants or employers of participants, including but not limited to, invoices, correspondence, copies of client checks and computerized records;

h. All documents relating to premium payments made to insurance carriers including the basis for the premium charged or credited;

i. All documents relating to amounts of commission, premium taxes, charges for risk or contingencies other retention charges, reserve charges and other expenses charged or chargeable by insurance carriers;

j. All documents relating to claims adjudication, including but not limited to, claims submitted, claims approved, computerized records, correspondence, records of claims paid and unpaid and submission to re-insurers or stop loss insurers;

k. All documents relating to expenses paid by the VEBA Trusts for administrative expenses (including service provider fees), benefits claims and daily operations;

l. Documents identifying all bank accounts in the name of the Plans or for the benefit of the Plans;

m. Signed copies of the filed Form 5500 or 5500 C/R for years 2000-2002 (Annual Return/Report of Employee

Benefit Plans) with all attachments as required (e.g Schedules A,B, C, independent public accountant's report the auditor's opinion and financial statement) or if not applicable the Form M1 filing;

n. Summary Annual Reports for 2000-2002;

o. All documents which identify all individuals or business entities that provide goods and/or services during the

last five years including (i) the names of the individuals o business entities; (ii) the most recent address and tele phone number of the service provider; and (iii) length o their service with each plan. Such goods and/or service include, but are not limited to, accounting, auditing, ad ministrative, appraisal, consulting, banking, brokerage, in vestment, advisory, investment management, insuranc and legal;

p. The fidelity bond for each of the Plans, including but no limited to, declaration page and loss payover rider, an documents identifying the VEBA Trust or Plan as a name insured and specifying the amount of coverage and name o surety company;

q. Fiduciary liability policy for any fiduciary of the Plan including but not limited to, declaration page and loss pay over rider, and documents identifying the Plan as a name insured and specifying the amount of coverage and the nam of the insurance company; and

r. All documents relating to insurance policies held by th Plans.

Return of Service

I hereby certify that the original of the within subpoena was duly served on the person named herein.

(Check method used)

[ ] *in person*

[ ] *by certified or registered mail*

[ ] *other (specify)*_____

[ ] *by leaving at principal office or place of business, to wit:*

on

_____

(Month, day, year)

_____

(Name of person making service)

_____

(Official Title)

Certification of Compliance

I certify that the person named herein was in attendance as a witness and/or produced the records requested herein at

on

_____

(Month, day, year)

_____

(Name of person certifying)

U.S. Department of Labor

Employee Benefits Security Administration
Philadelphia Regional Office
The Curtis Center – Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317
Phone: (215) 861-5300
Telefax: (215) 861-5347

February 4, 2004

Koresko & Associates
200 West Fourth Street
Bridgeport, Pennsylvania 19045

Re: Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Health and Welfare Benefit Plan

Dear Sir or Madam:

This office is conducting an investigation of the above referenced employee benefit plan pursuant to Section 504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1134(a)(1), to determine whether any persons has violated or is about to violate any provision of Title I of ERISA.

Accompanying this letter is subpoena duces tecum directed towards Koresko & Associates requiring the production of certain specified documents. These documents are necessary

and relevant to the above-referenced investigation. If any documents called for are not furnished, please list such documents and indicate their location and the reason for non-production. Your personal appearance pursuant to this subpoena will not be required, provided the documents as required in the subpoena are produced.

If you have any questions, please contact Investigator Bindu A. George at (215) 861-5314, on or before February 24, 2004. In the absence of any expressly agreed alternative procedure, we will expect full compliance with the subpoena at the time and place indicated therein.

Sincerely,

Mabel L. Capolongo
Regional Director
Philadelphia Region

Enclosure

SUBPOENA
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
Employee Benefits Security Administration

To: ***Koresko & Associates***
200 West Fourth Street
Bridgeport, Pennsylvania 19405

You are hereby required to appear before Investigator Bindu A. George of the Employee Benefits Security Administration U.S. Department of Labor, at 170 S. Independence Mal West, Suite 870 West, in the City of Philadelphia, on ***the 9th day of March 2004 at 10:00 a.m.*** *of that day, to testify in the matter of an investigation of*

Regional Employer's Assurance Leagues Voluntary Employees' Beneficiary Association Plan

being conducted pursuant to Section 504 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1134, in order to determine whether any person has violated or is about to violate any provision of Title of ERISA or any regulation or order thereunder;

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: See attached.

Fail not at you peril.

***In testimony where I** have hereunto affixed my signature and the seal of the **United States Department of Labor** in Silver Spring, Maryland this____ day of January 2004*

MABEL L. CAPOLONGO, REGIONAL DIRECTOR

ATTACHMENTS TO SUBPOENA FOR KORESKO & ASSOCIATIONS

A. Definition and Instructions

1. The term "employee benefit plans" shall mean an employee pension benefit plan as defined in section 3(2)(A) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1002(1) and sections related thereto or an employee welfare benefit plan as defined in section 3(1) of ERISA and sections related thereto.

2. The term "Plans" shall mean all employee benefit plans sponsored, established, administered or maintained by Penn Mont Benefit Services, Inc.

3. The term "Penn-Mont" shall mean the Penn-Mont Benefit Services, Inc. and any predecessor, successor, subsidiary or affiliate corporation.

4. The term "DVL" shall mean the Delaware Valley League and any predecessor, successor, subsidiary or affiliate organization.

5. The term "REAL" shall mean the Regional Employers Assurance League and any predecessor, successor, subsidiary or affiliate organization.

6. The term "VEBA Trusts" shall mean all Voluntary Employees Beneficiary Associations Trusts created by, sponsored by or otherwise related to the DVL, REAL or Penn Mont including VEBA Trust established by employers or

plan sponsors who use the services and/or products of the DVL, REAL or Penn-Mont or who participate, use are members of the DVL or REAL.

7. The term "service provider" shall mean any person or entity providing services to the DVL, REAL, Penn-Mont or the VEBA Trusts.

8. The term "document" or "documents" means "writings" or "recordings" within the meaning of Section 1001 of the Federal ~~Rules of~~ Evidence, consisting of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. Such documents shall include all such writings or recordings, of every kind and regardless of where located, which are within your possession, custody, or control, or the possession, custody, or control of any agent, employee, representative, or other persons acting or purporting to act for or on your behalf, including, but not limited to, contracts, agreements, correspondence, memoranda, reports, plan amendments, plan resolution, letters, notices, authorizations, ledger books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, work papers, notes, drafts, copies, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, reports or summaries of negotiations, marginal notations, bills, invoices, checks, bank statements, lists, journals, computer tapes and cards, and all other written, printed, recorded or photographic matter or sound reproduction, however produced or reproduced.

9. The term "relating to" means constituting, referring to pertaining to, or containing any information which in any way concerns, affects, or describes the terms or conditions or identifies facts, with respect to the subject of the injury.

10. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather exclusive. The use of the word "including" shall be constructed to mean "without limitation."

11. The term "communications" shall mean or refer to al inquires, agreements, understandings, meeting, telephone conversations, letters, notes, telegrams, telexes, cable advertisements, computer programs, diskettes, electronic mail system, and other forms of verbal intercourse, whether oral o written.

12. The term "fiduciary" shall have the same meaning a such term has under section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C §1002(21), and sections and regulations related thereto.

13. If any document required to be produced pursuant to thi subpoena is withheld because of a claim of privilege, identify with respect to each document:

a. the specific privilege being asserted;

b. the nature of the document, e.g., letter, memorandum

c. the author of the document and the date it was prepared;

d. the recipient of the document and all individuals wh received copies of it;

e. the subject matter of the document.

14. Unless otherwise specified, the time period covered by this request is from January 1, 2000 to the final date of production. Documents created prior to January 1, 2000, but which have been used or relied on since January 1, 2000, or which describe legal duties which remain in effect after January 1, 2000 (such as contracts and agreements), shall be produced in response to this request.

B. Documents to Be Produced:

1. All documents concerning Penn-Mont and its organization, structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of Penn-Mont including the names of the individuals, their title or positions, and the length of time in that position;

b. All documents prepared, executed or used to establish and administer or operate Penn-Mont;

c. All documents relating to the type of products or services offered or performed by Penn-Mont;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by Penn-Mont; and

e. All documents identifying the names and addresses of every employer or plan sponsor that has established, adopted or participates in any group benefits plan or pro

gram identified in a document produced in response tc paragraph 1(d) above.

2. All documents concerning the DVL and its organization structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of the DVL including the names of the individuals, their titles or positions, and the length of time in that positions;

b. All documents prepared, executed or used to established and administer or operate the DVL;

c. All agreements, contracts, memoranda of understanding and other such documents reflecting or containing any agreement between the DVL and any services providers employee benefit plans, employers or labor organizations;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by DVL; and

e. All documents identifying the names and addresses of every employer that has established, adopted or participates in any group health plan or program identified in a document produced in response to paragraph 2(d).

3. All documents concerning the REAL and its organization structure, operation and purpose including, but not limited to:

a. All documents identifying the directors and officers of the REAL including the names of the individual, their titles or positions, and the length of time in that positions;

b. All documents prepared, executed or used to establish and administer or operate the REAL;

c. All agreements, contracts, memoranda of understanding and other such documents reflecting or containing any agreement between the REAL and any service providers, employee benefits plans, employers or labor organizations;

d. All documents relating to the sales, marketing, advertising and promotion of group health, accident, life insurance, dental, vision and prescription benefit plans or programs by REAL; and

e. All documents identifying the names and addresses every employer that has established adopted or participates in any group health plan or program identified in a document produced in response to paragraph 3(d).

4. All documents prepared, executed or used to establish, administer or operate the VEBA Trust including;

a. All documents identifying the names and address of every employer that is a member of, participates in, contributes to, uses, has established, maintains or sponsors a VEBA Trust and the name of the VEBA Trust established;

b. All documents identifying the trustees of any VEBA Trusts identified in paragraph 4(a), which should include the names of the trustees, addresses and the length of time in that position;

c. Minutes of any Board of Trustee, Administrative Committee or other pertinent meetings concerning the VEBA Trusts;

d. Documents identifying the names and addresses of all participants in the VEBA Trusts;

e. All documents utilized in enrolling or the joining of employers in any of the VEBA Trusts;

f. All documents relating to insurance policies held by the VEBA Trusts;

g. All documents relating to assets held by the VEBA Trusts;

h. All documents of all of the VEBA Trusts relating to expenses paid by the VEBA Trusts for administrative expenses (including service provider fees), benefits claims and daily operations;

i. Documents identifying all bank accounts in the name of the VEBA Trusts or for the benefit of the VEBA Trusts;

j. All documents which identify all individuals or business entities that provide goods and/or services to any VEBA Trusts during the last five years including (i) the names of the individuals or business entities; (ii) the most recent address and telephone number of the service provider; and (iii) length of their service with each plan. Such goods and/or services include, but are not limited to, accounting, auditing, administrative, appraisal, consulted, banking, brokerage, investment, advisory, investment management, insurance and legal;

k. The Fidelity bond for each of the VEBA Trusts, including but not limited to declaration page and loss

l. Fiduciary liability policy for any fiduciary of the VEBA Trust, including but not limited to declaration page and loss payover rider, and documents identifying the Plan as a named insured and specifying the amount of coverage and name of insurance company; and

m. Documents identifying all persons who control, direct or exercise any authority over or on behalf of any VEBA Trust which should include (i) the names of the persons, (ii) addresses, (iii) position or title and (iv) length of time in that position.

5. For each Plan that is a member of, participate in, contributes to, uses, has established, maintains or is otherwise related to the VEBA Trusts identified in paragraph 4 and its subparts above, provide:

a. All documents relating to the Plans including, but not limited to, any amendments and any prototype documents and amendments;

b All documents relating to the trust agreements;

c. All documents relating to the signed adoption agreements;

d. All documents relating to the Summary Plan Descript ion;

e. Documents identifying the names and address of all participants in the Plans;

f. All documents relating to bank record, including but not limited to, account signature card files, deposit slips checks, wire transfer, monthly statements, current account information, cash management account agreements and correspondence regarding the accounts.

g. All documents relating to billing participants or employers of participants, including but not limited to, invoices, correspondence, copies of client checks and computerized records;

h. All documents relating to premium payments made to insurance carriers including the basis for the premium charged or credited;

i. All documents relating to amounts of commission, premium taxes, charges for risk or contingencies other retention charges, reserve charges and other expenses charged or chargeable by insurance carriers;

j. All documents relating to claims adjudication, including but not limited to, claims submitted, claims approved, computerized records, correspondence, records of claims paid and unpaid and submission to re-insurers or stop loss insurers;

k. All documents relating to expenses paid by the VEBA Trusts for administrative expenses (including service provider fees), benefits claims and daily operations;

l. Documents identifying all bank accounts in the name of the Plans or for the benefit of the Plans;

m. Signed copies of the filed Form 5500 or 5500 C/R for years 2000-2002 (Annual Return/Report of Employee

Benefit Plans) with all attachments as required (e.g. Schedules A,B, C, independent public accountant's report, the auditor's opinion and financial statement) or if not applicable the Form M1 filing;

n. Summary Annual Reports for 2000-2002;

o. All documents which identify all individuals or business entities that provide goods and/or services during the last five years including (i) the names of the individuals or business entities; (ii) the most recent address and telephone number of the service provider; and (iii) length of their service with each plan. Such goods and/or services include, but are not limited to, accounting, auditing, administrative, appraisal, consulting, banking, brokerage, investment, advisory, investment management, insurance and legal;

p. The fidelity bond for each of the Plans, including but not limited to, declaration page and loss payover rider, and documents identifying the VEBA Trust or Plan as a named insured and specifying the amount of coverage and name of surety company;

q. Fiduciary liability policy for any fiduciary of the Plan, including but not limited to, declaration page and loss payover rider, and documents identifying the Plan as a named insured and specifying the amount of coverage and the name of the insurance company; and

r. All documents relating to insurance policies held by the Plans.

Return of Service

I hereby certify that the original of the within subpoena was duly served on the person named herein.

(Check method used)

[ ] *in person*

[ ] *by certified or registered mail*

[ ] *other (specify)*_____

[ ] *by leaving at principal office or place of business, to wit:*

on

_____
(Month, day, year)

_____
(Name of person making service)

_____
(Official Title)

Certification of Compliance

I certify that the person named herein was in attendance as a witness and/or produced the records requested herein at

on

_____
(Month, day, year)

_____

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Elaine L. Chao, Secretary	:	
Of Labor,United States	:	
Department Of Labor	:	
	:	Misc. Civ. Action No
Petitioner,	:	
	:	
	:	
v.	:	
John J. Koresko, V.,	:	
Regional Employers'	:	
Assurance Leagues,	:	
Delaware Valley League,	:	
Penn-Mont Benefit Services,	:	
Inc. and Koresko &	:	
Associates,	:	
Respondents.	:	

ORDER

AND NOW, this____ day of _____, 2004, upon consideration of the Secretary of Labor's Petition to Enforce Administrative Subpoenas, and any response thereto, it is hereby ORDERED that said Petition is GRANTED, and further, that;

Respondents John J. Koresko, V., Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc. and Koresko & Associates, collectively "Respondents," shall produce all documents covered by the administrative subpoenas issued by the Employee Benefits Security Administration ("EBSA"), United States Department Labor. These documents shall be delivered by Respondents to the ERISA Philadelphia Regional Office, the Curtis Center, Suite 870 West, 170 South Independence Mall West, Philadelphia, PA 19106-3317 within seven days from the date of this Order.

_____

Date: United States District Court

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2004 a copy of the foregoing Secretary's Petition to Enforce Administrative Subpoenas, Memorandum of Law in Support of Petition to Enforce Administrative Subpoenas, Declaration of Bindu A. George, Order to Show Cause, and Proposed Order were served via first-class mail to:

Virginia I. Miller
Anderson, Kill & Olick, P.C.
1600 Market Street
Suite 2500
Philadelphia, PA 19103

John J. Koresko, V.
200 West Fourth Street
Bridgeport, PA 19405

Regional Employers' Assurance Leagues
200 West Fourth Street
Bridgeport, PA 19400

Delaware Valley League
200 West Fourth Street
Bridgeport, PA 19405

Penn-Mont Benefit Services, Inc.
200 West Fourth Street
Bridgeport, PA 19405

Koresko and Associates
200 West Fourth Street
Bridgeport, PA 19405

Natalie A. Appetta
Attorney

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Elaine L. Chao, Secretary Of Labor,United States Department Of Labor	:	
	:	Misc. Civ. Action No
Petitioner,	:	
	:	
	:	
v.	:	
John J. Koresko, V., Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc. and Koresko & Associates,	:	
Respondents.	:	

ORDER TO SHOW CAUSE

It is hereby ORDERED that:

1. A hearing will be held at the United States District Courth for the Eastern District of Pennsylvania, in Courtroom No.____, 2004 at _____ at which time respondents John J. Koreko, V. Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc. and Koresko & Associates, shall show cause why, if any,

they should not be required to produce all of the documents requested in the attachments to the subpoenas.

2 A representative of the Employee Benefits Security Administration, shall serve on Respondents forthwith an executed copy of this Order to Show Cause, along with the Petition to Enforce Administrative Subpoena, Memorandum of Law in Support of Petition to Enforce Administrative Subpoena, Declaration of Bindu A. George, and proposed Order.

APPENDIX O – RESPONSE AND OBJECTIONS TO SUBPOENAS, DATED JUNE 16, 2004

ANDERSON KILL & OLICK, P.C.
Virginia I. Miller
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

ATTORNEYS FOR PENN-MONT BENEFIT SERVICES, INC. ("PENN-MONT"); REGIONAL EMPLOYERS' ASSURANCE LEAGUES ("REAL VEBA");JOHN J. KORESKO, V. ("ATTORNEY KORESKO");DELAWARE VALLEY LEAGUE ("DVL");KORESKO & ASSOCIATES, P.C. ("KAPC")
(collectively "DEPONENTS")

In re REGIONAL EMPLOYERS' ASSURANCE LEAGUES, et al.	DOL Case

RESPONES AND OBJECTIONS TO SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO JOHN J. KORESKO, V. ESQUIRE DATED FEBRUARY 4, 2004

John J. Koresko, V., Esquire, ("ATTORNEY KORESKO" or "DEPONENT" or "RESPONDING PARTY"), by his undersigned counsel, hereby objects to the Subpoena In An Investigation/Adversary Proceeding To John J. Koresko, Esquire dated February 4, 2004 (the "Subpoena") served by the U.S. Department of Labor ("DOL"). These Objections apply to all identical subpoenas similarly dated and served on ATTORNEY KORESKO relating to his clients. The objections are as follows:

PRELIMINARY STATEMENT

Each of the following Responses is made solely for the purpose of this action. Each Response is subject to any and all objections to competency, relevance, materiality, proprietary, and admissibility. In addition, each Response is subject to any and all objections and/or grounds that would require the exclusion of any statement or material provided, or any part thereof, to any Demand which were asked of, or any statement or material provided by, witnesses present and testifying in court. All objections are reserved and may be asserted at the time of any hearing or trial. The Responses are based upon information presently available to Responding Party. The fact that Responding Party has responded to or objected to any Request should not be taken as an admission that the Demand or Response thereto constitutes admissible evidence. The mere fact that Responding Party has responded to part of or all of any Demand is not intended to

be, and shall not constitute a waiver by Responding Party of any objections to the Demand.

Responding Party has not completed his investigation and discovery of the matters at issue in this action and the Responses are based upon his knowledge, information and belief as of this date. Responding Party has not completed his discovery in preparation for the trial of this matter. Accordingly, these responses are made without prejudice to Responding Party's right to present additional documents, facts or contentions based upon information hereafter obtained or evaluated. Responding Party reserves the right to make further responses if it appears that any omission or error has been made in connection with these Responses or in the event future or more accurate information is available. The Responses are made without prejudice to the right to present at trial such additional evidence as may be later discovered or evaluated. Many of the materials requested have already been produced with copies stamped sequentially that have been provided to the DOL. Any additional documents called for by these Requests will be produced subject to the general and specific objections.

The Preliminary Statement is incorporated in its entirety into each and every Response and is further incorporated by reference as a part of the General Objections.

GENERAL OBJECTIONS

The General Objections set forth below apply to each of the Requests and are not necessarily repeated in response to each individual Request. The assertion of the same, similar or additional objections in Responding Party's specific objections to individual Requests or the failure to assert any

additional objections to a Request does not waive any of Responding Party's objections set forth in this section or the objections set forth in the General Objections section below Responding Party expressly reserves the right to supplement its objections at or after the time of its responses.

1. Responding Party objects to the DOL's definitions and instructions to the extent they purport to alter or expand upon the duties imposed by the Administrative Rules and the Rules of Civil Procedure.

2. Responding Party objects to the Requests to the extent that they seek information that protected by the attorney-client privilege, the work-product doctrine, and/or other applicable privileges or immunities.

3. Responding Party objects to the Requests to the extent that they seek information that is confidential.

4. Responding Party objects to the Requests to the extent that Responding Party is unable to answer fully, absent complete discovery.

5. Responding Party objects to the Requests to the extent that they are overbroad, unduly burdensome or oppressive, unreasonably cumulative or duplicative, or to the extent that they seek information that could be obtained from some other source that is more convenient, less burdensome, or less expensive.

6. Responding Party objects to the Requests to the extent that they seek information already or equally in the DOL's, custody, or control. Responding Party objects to each Request

to the extent that is seeks documents or information not in Responding Party's possession, custody or control.

7. Responding Party objects to each Request to the extent that it Requests Responding Party to identify "all" documents or communications on the grounds that such Requests, as framed, are oppressive, overly burdensome, overly broad, vexatious, harassing and not indicative of good faith and fair dealing.

8. Responding Party objects to each Request to the extent that it Requests Responding Party to produce documents maintained by or relating to "each" or "all" of the Responding Party on the grounds that such Requests, as framed, are oppressive, overly burdensome, overly broad, vexatious, harassing and not indicative of good faith and fair dealing.

9. Responding Party objects to each Request to the extent that it seeks the identification of communications as opposed to the production of documents.

10. The DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rules which DOL has violated in this instance.

11. The information requested by DOL is overbroad and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

12. DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.

13. DEPONENT objects based on attorney-client privilege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has

not satisfied the standard for jurisdiction and rightfulness of the subpoena.

14. The DOL's request for documents and information is counter to the DOL's position on multiple employer trusts ("MET") that has been restated numerous times since 1984 See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3 DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. Gruber v. Hubbard Berr Karle Weber, Inc. 159 F.3d 780, 787 (3d. Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A Oct 31, 1996)); MDPhysicians & Associates Inc. v. State Board of Insurance, 957 F.2d 178 (5th Cir. 1992) (Amicus Curiae – U.S. Secretary Of Labor), Taggart Corp., et al v Life & Health Benefits Admin. Inc., et al., 617 F.2d 1208 1210 (5th Cir. 1980); Donavan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982); Finderne Management Company, Inc. v Barrett, 355 N.J. Super. 170, 809 A.2d 842 (N.J. Super. App Div. 11/20/2002) (Amicus Curiae United States Department of Labor).

15. The DOL is trying to do discovery for an on-going litigation styled REAL VEBA, et al. v. Sidney Charles Markets, et al, (E.D. Pa). In the case of a live judicial controversy, KORESKO as attorney of record and the other DEPONENTS claim attorney-client privilege and litigation privilege as to those files. Certain records, which are public documents produced in those cases will be produced at the offices of the DEPONENTS' attorney of record as stated below.

16. Furthermore, it is clear that the REAL VEBA has complied with the law, or else the two district courts involved would have given them, as parties, relief requested.

17. In addition, DEPONENT considers this a gross abuse of authority which is designed to circumvent the privileges claimed in previous depositions held in the *Sidney Charles Markets* cases. On information and belief, DOL is aware of those depositions and assertions of privilege from the complaint.

18. ERISA provides that any administrative subpoena has to be related to information that would be reportable to DOL. None of the information DOL has subpoenaed is reportable to DOL. First, REAL VEBA is not a DOL recognized MEWA ("Multiple Employer Welfare Arrangement"). Second, there is an administrative exemption for insurance-only plans. Under sec. 512 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. As REAL VEBA is not a MEWA, according to DOL, a Form 5500 need not be filed. Further, life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 512.

19. DEPONENT objects as Sec. 512 further states that DOL can make any information public and such public disclosure conflicts with privacy legislation and any other rule of discovery protection. The ERISA section gives DOL the authority to re-publish all information that DOL receives. Such authority would breach privilege and work product protect

tions. First, much of the info they request is tax return information, which DEPONENTS are barred from disclosing by the Internal Revenue Code. Additionally, DOL requests confidential business records, which are protectable from disclosure. The law firm currently possesses certain of the requested records, and they will not be disclosed pursuant to attorney-client privilege. As to the insurance contracts, in all REAL VEBA participant agreements, DEPONENTS are listed as attorney-in-fact to which DEPONENTS assert privilege. The life insurance records contain info protected by privacy legislation and attorney-client privilege. To certain of these records, DEPONENTS have asserted privilege in the *Sidney Charles Markets* case.

20. The current ERISA rules for re-publication of information would also result in a violation of the HIPPA privacy rules.

21. HIPPA indirectly repealed part of ERISA 512 that the DOL is invoking.

22. The current ERISA rules for re-publication of information would also result in no protection for trade secrets. Absent a signed Confidentiality Agreement, DEPONENT cannot and will provide such information.

23. The DOL has not met its burden regarding requesting of information by establishing that there is a MEWA that DOL may regulate. DOL must first satisfy a preliminary test to determine whether there is any employer or employee control. DEPONENTS already provided that information in a previous response to DOL's investigator. Under previous DOL advisory letters, DOL has refused to say that the con-

trol requirement in VEBA, IRC 501(c)(9), which is satisfied by an independent trustee, makes a VEBA an "employees beneficiary association" for purposes of ERISA. DOL has refused to issue any regulations. In the absence of authority, and their previous rulings on organizations similar to REAL VEBA, DEPONENTS are absolutely justified in maintaining that DOL has no jurisdiction. DOL has admitted such and is estopped by such position. DOL's previous position implicates judical estoppel.

24. All records requested from the entities subpoenaed are the property of the law firm of Koresko & Associates, P.C. ("K&A"). K&A is claiming all records as work product or privileged information.

25. Notice 95-34, issued by the Internal Revenue Service in 1995, was a clear statement of intent to litigate the issues included in the information sought by the DOL. DEPONENT claims the files as work product on the basis that all information requested was assembled under the threat of and in anticipation of litigation, as well.

26. The Subpoena violates the DEPONENT's right, including: the right to privacy under the United States Constitution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to confront accusers as DOL has refused to provided any information on the accusations or accusers; and a right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM case. Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

27. DOL has failed to provide a witness fee pursuant to the Federal Rules.

28. DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not permitted without some probable cause. Such request in and of itself would cost DEPONENT thousands of dollars in time and actual reproduction costs, and is therefore clearly unreasonable in the absence of a jurisdictional predicate.

29. DOL requests that DEPONENT reproduced all financial data prior to 1999 – this information is lost due to hard drive crashes that were previously reported to the United States Attorney's Office in Connection with an investigation (of someone else) DEPONENT is cooperating with.

30. DEPONENT, as litigant or counsel in on-going litigation has the right to find out if DOL is being used by Sidney Charles Markets, as that goes to the "rightfulness" of the subpoena. If the DOL is interfering in litigation, DEPONENT has the right and authority to fight the subpoena simply on that basis, and assert that the procedures of the Court vested with jurisdiction in that matter and the discovery provisions of the Federal Rules take precedence.

31. DEPONENT, as a law firm with an outstanding reputation in the community, has the right to protect that reputation from negative implications that could result from the DOL's policies and procedures with respect to administrative subpoenas.

32. Under New York State Bar Association v. Federal Trade Commission, No. 02-810 (D.D.C. 2003), the regulation of activities of attorneys is constitutionally vested in the Supreme Courts of the various States and the Judicial Branch of the Federal Government under Article III of the Constitution

and such regulatory authority supercedes that of the Federal Trade Commission, and therefore, the Department of Labor.

33. Any disclosure, if ever agreed to by DEPONENT, will be done on a plan by plan basis, based upon full disclosure of an actual complaint, as DOL only has authority over plans, not the REAL VEBA trust.

34. Based upon the totality of the objections to this subpoena, DEPONENT believes that this administrative subpoena has been issued with improper purpose.

35. Based upon the totality of the objections to this subpoena, DEPONENT believes there is no probable cause to suspect a violation of ERISA and demands further proof. DEPONENT gave various information to the U.S. Attorney and DOL investigator last year.

36. Although under no obligation to do because of the previous objections, DEPONENT agrees to produce at the offices of its counsel of record at the below address the *Sidney Charles Markets* pleadings as these are public records. SCM waived their privilege as to these documents. These documents are a sample of the document subpoenaed. SCM was never in REAL VEBA, so SCM has no standing to waive such privilege and to DEPONENT's knowledge, no other REAL VEBA participant has waived such privilege.

RESPONSES TO SUBPOENA

1. Incorporating all the above objections, specifically all records requested from the entities subpoenaed are the prop

erty of the law firm of Koresko & Associates, P.C. ("K&A"). K&A is claiming all records as work product or privileged

information. Responding Party claims absolute privilege tc these files.

2. Incorporating all the above objections, specifically al records requested from the entities subpoenaed are the prop erty of the law firm of Koresko & Associates, P.C. ("K&A") K&A is claiming all records as work product or privilege information. Responding Party claims absolute privilege t these files.

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Respectfully submitted,

Dated: June , 2004

VIRGINIA I. MILLER
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202
Attorneys of DEPONENT

CERTIFICATE OF SERVICE

I hereby certify that at my direction a true and correc copy of the Responses and Objections To Subpoena In Ai Investigation/Adversary Proceeding to Koresko & Associ ates, P.C. ("KAPC") dated February 4, 2004 was served thi date, via hand delivery, as follows:

MABEL L. CAPOLONGO
Regional Director, US DOL
Employees Benefits Security Adminstration
The Curtis Center, Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317

Dated: May 28, 2004

By: _____

Virginia I. Miller

ANDERSON KILL & OLICK, P.C
Virginia I. Miller
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

ATTORNEYS FOR PENN-MONT BENEFIT SERVICES, INC. ("PENN-MONT"); REGIONAL EMPLOYERS' ASSURANCE LEAGUES ("REAL VEBA"); JOHN J. KORESKO, V. ("ATTORNEY KORESKO"); DELAWARE VALLEY LEAGUE ("DVL");KORESKO & ASSOCIATES, P.C. ("KAPC")
(collectively "DEPONDENTS")

In re REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION-HEALTH AND WELFARE BENEFIT PLAN	DOL Case

OBJECTION TO SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO KORESKO & ASSOCIATES, P.C. DATED FEBRUARY 4, 2004

KORESKO & ASSOCIATES, P.C. ("KAPC" or "DEPONENT"), by its undersigned counsel, hereby objects to the

Subpoena In An Investigation/Adversary Proceeding T KORESKO & ASSOCIATES, P.C. dated February 4, 200 (the "Subpoena") served by the U.S. Department of Labo ("DOL"). These Objections apply to all identical subpoena similarly dated and served on KAPC relating to its clients The objections are as follows:

PRELIMINARY STATEMENT

Each of the following Responses is made solely for th purpose of this action. Each Response is subject to any an all objections to competency, relevance, materiality, proprie tary, and admissibility. In addition, each Response is subjec to any and all objections and/or grounds that would requir the exclusion of any statement or material provided, or an part thereof, to any Demand which were asked of, or an statement or material provided by, witnesses present and tes tifying in court. All objections are reserved and may be as serted at the time of any hearing or trial. The Responses ar based upon information presently available to Respondin Party. The fact that Responding Party has responded to o objected to any Request should not be taken as an admissio that the Demand or Response thereto constitutes admissibl evidence. The mere fact that Responding Party has re sponded to part of or all of any Demand is not intended t be, and shall not constitute a waiver by Responding Party o any objections to the Demand.

Responding Party has not completed its investigation and discovery of the matters at issue in this action and the Re sponses are based upon its knowledge, information and be lief as of this date. Accordingly, these responses are made without prejudice to Plaintiffs' rights to present additional

documents, facts or contentions based upon information hereafter obtained or evaluated. Responding Party reserves the right to make further responses if it appears that any omission or error has been made in connection with these Responses or in the event future or more accurate information is available. The Responses are made without prejudice to the right to present at hearing and/or trial such additional evidence as may be later discovered or evaluated. Many of the materials requested have already been produced with copies stamped sequentially that have been provided to the DOL. Any additional documents called for by these Requests will be produced subjection to the general and specific objections.

The Preliminary Statement is incorporated in its entireyy into each and every Response and is further incorporated by reference as a part of the General Objections.

GENERAL OBJECTIONS

The General Objections set forth below apply to each of the Requests and are not necessarily repeated in response to each individual Request. The assertion of the same, similar or additional objections in Responding Party's specific objections to individual Requests or the failure to assert any additional objections to a Request does not waive any of Responding Party's objections set forth in this section or the objection set forth in the General Objections section below. Responding Party expressly reserves the right to supplement its objections at or after the time of its responses.

1. Responding Party Objects to Defendants' definitions and instructions to the extent they purport to alter or expand upon the duties imposed by the Rules of Civil Procedure.

2. Responding Party objects to the Requests to the exter that they seek information protected by the attorney-clier privilege, the work-product doctrine, and/or other applicabl privileges or immunities.

3. Responding Party objects to the Requests to the exter that they seek information that is confidential.

4. Responding Party objects to the Requests to the exten that Plaintiffs are unable to answer fully, absent complet discovery.

5. Responding Party objects to the Request to the exten that they are overboard, unduly burdensome or oppressive unreasonably cumulative or duplicative, or to the extent tha they seek information that could be obtained from som other source that is more convenient, less burdensome, o less expensive.

6. Responding Party objects to the Requests to the exten that they seek information already or equally in Defendant': possession, custody, or control. Responding Party objects t each Request to the extent that it seeks documents or infor mation not in Plaintiffs' possession, custody or control.

7. Responding Party objects to each Request to the exten that it Requests Plaintiffs to identify "all" documents o communications on the grounds that such Requests, a framed, are oppressive, overly burdensome, overly broad vexations, harassing and not indicative of good faith and fai dealing.

8. Responding Party objects to each Request to the exten that it Request Plaintiffs to produce documents maintained

by or relating to "each" or "all" of the Plaintiffs on the grounds that such Requests, as framed, are oppressive, overly burdensome, overly broad, vexatious, harassing and not indicative of good faith and fair dealing.

9. Responding Party objects to each Request to the extent that it seeks the identification of communications as opposed to the production of documents.

10. The DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rules which DOL has violated in this instance.

11. The information requested by DOL is overboard and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

12. DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.

13. DEPONENT objects based on attorney-client privilege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.

14. The DOL's request for documents and information is counter to the DOL's position on multiple employer trusts ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of cer-

tain provisions exercised herein. Gruber v. Hubbard Be Karle Weber, Inc., 159 F.3d 780, 787 (3d. Cir. 1998) (citin DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A Oct 31, 1996)); MDPhysicians & Associates Inc. v. Stat Board of Insurance, 957 F.2d 178 (5th Cir. 1992) (Amicu Curiae – U.S. Secretary Of Labor), Taggart Corp., et al v Life & Health Benefits Admin. Inc., et al., 617 F.2d 1208 1210 (5th Cir. 1980); Donavan v. Dillingham, 688 F.2d 136 (11th Cir. 1982); Finderne Management Company, Inc. v Barrett, 355 N.J. Super. 170, 809 A.2d 842 (N.J. Super App. Div. 11/20/2002) (Amicus Curiae United States De partment of Labor).

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16. Furthermore, it is clear that the REAL VEBA ha complied with the law, or else the two district courts in volved would have given them, as parties, relief requested.

17. In addition, DEPONENT considers this a gross abus of authority which is designed to circumvent the privileges claimed in previous depositions held in the *Sidney Charles Markets* cases. On information and belief, DOL is aware of those depositions and assertions of privilege from the com plainant.

18. ERISA provides that any administrative subpoena has to be related to information that would be reportable to DOL. None of the information DOL has subpoenaed is reportable to DOL. First, REAL VEBA is not a MEWA. Second, there is an administrative exemption for insurance-only plans. Under sec. 512 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. REAL VEBA is not a MEWA, according to DOL, Form 5500 need be filed. Life insurance plans, so no such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 512.

19. DEPONENT objects as Sec. 512 further states that DOL can make any information public and such public disclosure conflicts with privacy legislation and any other rule of discovery protection. The ERISA section gives DOL the authority to re-publish all information that DOL receives. Such authority would breach privilege and work product protections. First, much of the info they request is tax return information, which DEPONENTS are barred from disclosing by the Internal Revenue Code. Additionally, DOL requests confidential business records, which are protectable from disclosure. The law firm currently possesses certain of the requested records, and they will not be disclosed pursuant to attorney-client privilege. As to the insurance contracts, in all REAL VEBA participation agreements, DEPONENTS are listed as attorney-in-fact to which DEPONENTS assert privilege. The life insurance records contain info protected by privacy legislation and attorney-client privilege. To certain

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21. HIPPA indirectly repealed part of ERISA 512 that th DOL is invoking.

22. The current ERISA rules for re-publication of informa tion would also result in no protection for trade secrets. Ab sent a signed Confidentiality Agreement, DEPONENT cannot and will provide such information.

23. The DOL has not met its burden regarding requesting of information by establishing that there is a MEWA that DOL may regulate. DOL must first satisfy a preliminary test to determine whether there is any employer or employee control. DEPONENTS already provided that information in a previous response to DOL's investigator. Under previous DOL advisory letters, DOL has refused to say that the control requirement in VEBA, IRC 501(c)(9), which is satisfied by an independent trustee, makes a VEBA an "employees beneficiary association" for purposes of ERISA. DOL has refused to issue any regulations. In the absence of authority, and their previous rulings on organizations similar to REAL VEBA, DEPONENTS are absolutely justified in maintaining that DOL has no jurisdiction. DOL has admitted such and is estopped by such position. DOL's previous position implicates judical estoppel.

24. All records requested from the entities subpoenaed are the property of the law firm of Koresko & Associates, P.C.

("K&A"). K&A is claiming all records as work product or privileged information.

25. Notice 95-34, issued by the Internal Revenue Service in 1995, was a clear statement of intent to litigate the issues included in the information sought by the DOL. DEPONENT claims the files as work product on the basis that all information requested was assembled under the threat of and in anticipation of litigation, as well.

26. The Subpoena violates the DEPONENT's rights, including: the right to privacy under the United States Constitution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to confront accusers as DOL has refused to provided any information on the accusations or accusers; and a right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM case. Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

27. DOL has failed to provide a witness fee pursuant to the Federal Rules.

28. DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not permitted without some probable cause. Such request in and of itself would cost DEPONENT thousands of dollars in time and actual reproduction costs, and is therefore clearly unreasonable in the absence of a jurisdictional predicate.

29. DOL requests that DEPONENT reproduce all financial data prior to 1999 – this information is lost due to hard drive crashes that were previously reported to the United

States Attorney's office in connection with an investigatio (of someone else) DEPONENT is cooperating with.

30. DEPONENT, as litigant or counsel in on-going litiga tion, has the right to find out if DOL is being used by Sidne Charles Markets, as that goes to the "rightfulness" of th subpoena. If the DOL is interfering in litigation, DEPO NENT has the right and authority to fight the subpoena sim ply on that basis, and assert that the procedures of the Cou vested with jurisdiction in that matter and the discovery pro visions of the Federal Rules take precedence.

31. DEPONENT, as a law firm with an outstanding repu tation in the community, has the right to protect that reputa tion from negative implications that could result from th DOL's policies and procedures with respect to administrativ subpoenas.

32. Under New York State Bar Association v. Federa Trade Commission, No. 02-810 (D.D.C. 2003), the regula tion of activities of attorneys is constitutionally vested in th Supreme Courts of the various States and the Judicial Branc of the Federal Government under Article III of the Constitu tion, and such regulatory authority supercedes that of th Federal Trade Commission, and therefore, the Department o Labor.

33. Any disclosure, if ever agreed to by DEPONENT, wil be done on a plan by plan basis, based upon full disclosure o an actual complaint, as DOL only has authority over plans not the REAL VEBA trust.

34. Based upon the totality of the objections to this subpoena, DEPONENT believes that this administrative subpoena has been issued with improper purpose.

35. Based upon the totality of the objections to this subpoena, DEPONENT believes there is no probable cause to suspect a violation of ERISA and demands further proof. DEPONENT gave various information to the U.S. Attorney and DOL investigator last year.

36. Although under no obligation to do because of the previous objections, DEPONENT agrees to produce at the offices of its counsel of record at the below address the *Sidney Charles Markets* pleadings as these are public records. SCM waived their privilege as to these documents. These documents are a sample of the documents subpoenaed. SCM was never in REAL VEBA, so SCM has no standing to waive such privilege and to DEPONENT's knowledge, no other REAL VEBA participant has waived such privilege.

RESPONSES TO SUBPOENA

1. Incorporating all the above objections, specifically all records requested from the entities subpoenaed are the property of the law firm of Koresko &Associates, P.C. ("K&A"). K&A is claiming all records as work product or privileged information. Responding Party claims absolute privilege to these files.

2. Incorporating all the above objections, specifically all records requested from the entities subpoenaed are the property of the law firm of Koresko & Associates, P.C. ("K&A"). K&A is claiming all records as work product or privileged

information. Responding Party claims absolute privilege t
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information. Responding Party claims absolute privilege t
these files.

Dated: June, 2004

Respectfully submitted,

_____

VIRGINIA I. MILLER
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202
Attorneys of DEPONENT

CERTIFICATE OF SERVICE

I hereby certify that at my direction a true and correct copy of the Responses and Objection To Subpoena In An Investigation/Adversary Proceeding to KORESKO & ASSOCIATES, P.C. ("KAPC") Dated February 4, 2004 was served this date, via hand delivery, as follows:

MABEL L. CAPOLONGO
Regional Director, US DOL
Employees Benefits Security Adminstration
The Curtis Center, Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317

Dated: June, 2004

By: _____

Virginia I. Miller

ANDERSON KILL & OLICK, P.C

Virginia I. Miller
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

ATTORNEYS FOR PENN-MONT BENEFIT SERVICES, INC. ("PENN-MONT");REGIONAL EMPLOYERS' ASSURANCE LEAGUES ("REAL VEBA");JOHN J. KORESKO, V. ("ATTORNEY KORESKO");DELAWARE VALLEY LEAGUE ("DVL");KORESKO & ASSOCIATES, P.C. ("KAPC")
(collectively "DEPONDENTS")

In re REGIONAL EMPLOYERS' ASSURANCE LEAGUES, et al	DOL Case

RESPONSES AND OBJECTIONS TO SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO DELAWARE VALLEY LEAGUE DATED FEBRUARY 4, 2004

DELAWARE VALLEY LEAGUE ("DVL" or "DEPONENT" or "RESPONDING PARTY") by its undersigned counsel, hereby responds and objects to the Subpoena In An

Investigation/Adversary Proceeding to DELAWARE VALLEY LEAGUE dated February 4, 2004 (the "Subpoena") served by the U.S. Department of Labor ("DOL"). The responses and objections are as follows:

PRELIMINARY STATEMENT

Each of the following Responses is made solely for the purpose of this action. Each Response is subject to any and all objections to competency, relevance, materiality, proprietary, and admissibility. In addition, each Response is subject to any and all objections and/or grounds that would require the exclusion of any statement or material provided, or any part thereof, to any Demand which were asked of or, any statement or material provided by, witnesses present and testifying in court. All objections are reserved and may be asserted at the time of any hearing or trial. The Responses are based upon information presently available to Responding Party. The fact that Responding Party has responded to or objected to any Request should not be taken as an admission that the Demand or Response thereto constitutes admissible evidence. The mere fact that Responding Party has responded to part of or all of any Demand is not intended to be, and shall not constitute a waiver by Responding Party of any objections to the Demand.

Responding Party has not completed his investigation and discovery of the matters at issues in this action and the Responses are based upon his knowledge, information and belief as of this date. Responding Party has not completed his discovery in preparation for the trial of this matter. Accordingly, these responses are made without prejudice to Responding Party's rights to present additional documents,

facts or contentions based upon information hereafter ob tained or evaluated. Responding Party reserves the right t make further responses if it appears that any omission or er ror has been made in connection with these Responses or i the event future or more accurate information is available The Responses are made without prejudice to the right t present at trial such additional evidence as may be later dis covered or evaluated. Many of the materials requested hav already been produced with copies stamped sequentially tha have been provided to the DOL. Any additional document called for by these Requests will be produced subjection t the general and specific objections.

The Preliminary Statement is incorporated in its entiret into each and every Response and is further incorporated b reference as a part of the General Objections.

GENERAL OBJECTIONS

The General Objections set forth below apply to each of the Requests and are not necessarily repeated in each individual Request. The assertion of the same, similar or additional objections in Responding Party's specific objections to individual Requests or the failure to assert any additional objections to a Request does not waive any of Responding Party's objections set forth in this section or the objections set forth in the General Objections section below. Responding Party expressly reserves the right to supplement its objections at or after the time of its responses.

1. Responding Party objects to the DOL's definitions and instructions to the extent they purport to alter or expand upon the duties imposed by the Administrative Rules and the Rules of Civil Procedure.

2. Responding Party objects to the Requests to the extent that they seek information protected by the attorney-client privilege, the work-product doctrine, and/or other applicable privileges or immunities.

3. Responding Party objects to the Requests to the extent that they seek information that is confidential.

4. Responding Party objects to the Requests to the extent that Responding Party is unable to answer fully, absent complete discovery.

5. Responding Party objects to the Requests to the extent that they are overboard, unduly burdensome or oppressive, unreasonably cumulative or duplicative, or to the extent that they seek information that could be obtained from some other source that is more convenient, less burdensome, or less expensive.

6. Responding Party objects to the Requests to the extent that they seek information already or equally in the DOL's custody, or control. Responding Party objects to each Request to the extent that it seeks documents or information not in Responding Party's possession, custody or control.

7. Responding Party objects to each Request to the extent that it Requests Responding Party to identify "all" documents or communications on the grounds that such Requests, as framed, are oppressive, overly burdensome, overly broad, vexations, harassing and not indicative of good faith and fair dealing.

8. Responding Party objects to each Request to the extent that it Request to the extent that it Requests Responding

Party to produce documents maintained by or relating t "each" or "all" of the Responding Party on the grounds tha such Requests, as framed, are oppressive, overly burden some, overly broad, vexatious, harassing and not indicativ of good faith and fair dealing.

9. Responding Party objects to each Request to the exten that it seeks the identification of communications as opposec to the production of documents.

10. The DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rules which DOL has violated in this instance.

11. The information requested by DOL is overboard and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

12. DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.

13. DEPONENT objects based on attorney-client privilege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.

14. The DOL's request for documents and information is counter to the DOL's positions on multiple employer trusts ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA

plan and accordingly does not fall within the review of certain provisions exercised herein. Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A Oct. 31, 1996)); MDPhysicians & Associates Inc. v. State Board of Insurance, 957 F.2d 178 (5th Cir. 1992) (Amicus Curiae – U.S. Secretary Of Labor), Taggart Corp., et al v. Life & Health Benefits Admin. Inc., et al., 617 F.2d 1208, 1210 (5th Cir. 1980); Donovan v. Diilingham, 688 F.2d 1367 (11th Cir. 1982); Finderne Management Company, Inc. v. Barrett, 355 N.J. Super. 170, 809 A.2d 842 (N.J. Super. App. Div. 11/20/2002) (Amicus Curiae United States Department of Labor).

15. The DOL is trying to do discovery for an on-going litigation styled REAL VEBA, et al v. Sidney Charles Markets, et al, (E.D Pa). In the case of a live judicial controversy, KORESKO as attorney of record and the other DEPONENTS claim attorney-client privilege and litigation privilege as to those files. Certain records, which are public documents, produced in those cases will be produced at the offices of the DEPONENTS' attorney of record as stated below.

16. Furthermore, it is clear that the REAL VEBA has complied with the law, or else the two district courts involved would have given them, as parties, relief requested.

17. In addition, DEPONENT considers this a gross abuse of authority which is designed to circumvent the privileges claimed in previous depositions held in the *Sidney Charles Markets* cases. On information and belief, DOL is aware of

those depositions and assertions of privilege from the com plainant.

18. ERISA provides that any administrative subpoena ha to be related to information that would be reportable to DOL None of the information DOL has subpoenaed is reportabl to DOL. First, REAL VEBA is not a DOL recognize MEWA ("Multiple Employer Welfare Arrangement"). Sec ond, there is an administrative exemption for insurance-onl plans. Under sec. 512 of ERISA, DOL is only entitled to ge information that relates to items that would be disclosed on Form 5500 report. As REAL VEBA is not a MEWA, ac cording to DOL, a Form 5500 need not be filed. Further, life insurance plans, such as the ones involved with DEPO NENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be re portable on a Form 5500, there is no investigatory predicate under sec. 512.

19. DEPONENT objects as Sec. 512 further states that DOL can make any information public and such public dis closure conflicts with privacy legislation and any other rule of discovery protection. The ERISA section gives DOL the authority to re-publish all information that DOL receives. Such authority would breach privilege and work product pro tections. First, much of the info they request is tax return information, which DEPONENTS are barred from disclosing by the Internal Revenue Code. Additionally, DOL requests confidential business records, which are protectable from disclosure. The law firm currently possesses certain of the requested records, and they will not be disclosed pursuant to attorney-client privilege. As to the insurance contracts, in all REAL VEBA participant agreements, DEPONENTS are

listed as attorney-in-fact to which DEPONENTS assert privilege. The life insurance records contain info protected by privacy legislation and attorney-client privilege. To certain of these records, DEPONENTS have asserted privilege in the *Sidney Charles Markets* case.

20. The current ERISA rules for re-publication of information would also result in a violation of the HIPPA privacy rules.

21. HIPPA indirectly repealed part of ERISA 512 that the DOL is invoking.

22. The current ERISA rules for re-publication of information would also result in no protection for trade secrets. Absent a signed Confidentiality Agreement, DEPONENT cannot and will provide such information.

23. The DOL has not met its burden regarding requesting of information by establishing that there is a MEWA that DOL may regulate. DOL must first satisfy a preliminary test to determine whether there is any employer or employee control. DEPONENTS already provided that information in a previous response to DOL's investigator. Under previous DOL advisory letters, DOL has refused to say that the control requirement in VEBA, IRC 501(c)(9), which is satisfied by an independent trustee, makes a VEBA an "employees beneficiary association" for purposes of ERISA. DOL has refused to issue any regulations. In the absence of authority, and their previous rulings on organizations similar to REAL VEBA, DEPONENTS are absolutely justified in maintaining that DOL has no jurisdiction. DOL has admitted such and is estopped by such position. DOL's previous position implicates judical estoppel.

24. All records requested from the entities subpoenaed ar the property of the law firm of Koresko & Associates, P.C ("K&A"). K&A is claiming all records as work product o privileged information.

25. Notice 95-34, issued by the Internal Revenue Servic in 1995, was a clear statement of intent to litigate the issue included in the information sought by the DOL. DEPO NENT claims the files as work product on the basis that al information requested was assembled under the threat of anc in anticipation of litigation, as well.

26. The Subpoena violates the DEPONENT's right, in cluding: the right to privacy under the United States Consti tution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to confront ac cusers as DOL has refused to provided any information on the accusations or accusers; and a right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM case. Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

27. DOL has failed to provide a witness fee pursuant to the Federal Rules.

28. DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not permitted without some probable cause. Such request in and of itself would cost DEPONENT thousands of dollars in time and actual reproduction costs, and is therefore clearly unrea sonable in the absence of a jurisdictional predicate.

29. DEPONENT, as litigant or counsel in on-going litiga tion, has the right to find out if DOL is being used by Sidney

Charles Markets, as that goes to the "rightfulness" of the subpoena. If the DOL is interfering in litigation, DEPONENT has the right and authority to fight the subpoena simply on that basis, and assert that the procedures of the Court vested with jurisdiction in that matter and the discovery provisions of the Federal Rules take precedence.

30. DEPONENT, as an attorney at law with an outstanding reputation in the community, has the right to protect that reputation from negative implications that could result from the DOL's policies and procedures with respect to administrative subpoenas.

31. Under New York State Bar Association v. Federal Trade Commission, No. 02-810 (D.D.C. 2003), the regulation of activities of attorneys is constitutionally vested in the Supreme Courts of the various States and the Judicial Branch of the Federal Government under Article III of the Constitution, and such regulatory authority supercedes that of the Federal Trade Commission, and therefore, the Department of Labor.

32. Any disclosure, if ever agreed to by DEPONENT, will be done on a plan by plan basis, based upon full disclosure of an actual complaint, as DOL only has authority over plans, not the REAL VEBA trust.

33. Based upon the totality of the objections to this subpoena, DEPONENT believes that this administrative subpoena has been issued with improper purpose.

34. Based upon the totality of the objections to this subpoena, DEPONENT believes there is no probable cause to suspect a violation of ERISA and demands further proof.

DEPONENT gave various information to the U.S. Attorne and DOL investigator last year.

35. Although under no obligation to do because of th previous objections, DEPONENT agrees to produce at th offices of its counsel of record at the below address the *Sid ney Charles Markets* pleadings as these are public records The employer and employees of Sidney Charles Market ("SCM") waived their privilege as to these documents These documents are a sample of the documents subpoenaed SCM was never in REAL VEBA, so SCM has no standing t waive such privilege and to DEPONENT's knowledge, n other REAL VEBA participant has waived such privilege.

Responding Party reserves the right further to amend an supplement all of its Objections and Responses to the Re quests as additional responsive information is obtained b way of discovery or otherwise. Responding Party does no waive any of its rights by failing to list each and every possi ble piece of proof in this hearing or litigation. Finally, noth ing herein shall be construed as an admission by Respondin Party of the relevancy or of the admissibility at any hearin or trial of any information contained in any of the response set forth herein.

RESPONSES TO SUBPOENA

1. Responding Party incorporates here the General Ob jections above. Responding Party also objects to this Re quest as being overboard, unduly burdensome, harassing and compound. Responding Party objects to this Request t the extent that it seeks the production of documents relatin to subjects outside the custody and control of the Respondin Party. Responding Party further objects to this Request to

the extent that it calls for the production of documents or information protected by the attorney-client privilege or the work-product doctrine. Without waiving said objections, DVL ceased to exist at time period prior to January 1, 2000 and as such does not possess any responsive documents.

2. Responding Party incorporates here the General Objections above. Responding Party also objects to this Request as being overbroad, unduly burdensome, harassing, and compound. Responding Party objects to this Request to the extent that it seeks the production of documents relating to subjects outside the custody and control of the Responding Party. Responding Party further objects to this Request to the extent that it calls for the production of documents or information protected by the attorney-client privilege or the work-product doctrine. Without waiving said objections, DVL ceased to exist at time period prior to January 1, 2000 and as such does not possess any responsive documents.

3. Responding Party incorporates here the General Objections above. Responding Party also objects to this Request as being overbroad, unduly burdensome, harassing, and compound. Responding Party objects to this Request to the extent that it seeks the production of documents relating to subjects outside the custody and control of the Responding Party. Responding Party further objects to this Request to the extent that it calls for the production of documents or information protected by the attorney-client privilege or the work-product doctrine. Without waiving said objections, DVL ceased to exist at time period prior to January 1, 2000 and as such does not possess any responsive documents.

4. Responding Party incorporates here the General Objections above. Responding Party also objects to this Request as being overbroad, unduly burdensome, harassing and compound. Responding Party objects to this Request to the extent that it seeks the production of documents relating to subjects outside the custody and control of the Responding Party. Responding Party further objects to this Request to the extent that it calls for the production of documents or information protected by the attorney-client privilege or the work-product doctrine. Without waiving said objections DVL ceased to exist at time period prior to January 1, 2000 and as such does not possess any responsive documents.

5. Responding Party incorporates here the General Objections above. Responding Party also objects to this Request as being overbroad, unduly burdensome, harassing and compound. Responding Party objects to this Request to the extent that it seeks the production of documents relating to subjects outside the custody and control of the Responding Party. Responding Party further objects to this Request to the extent that it calls for the production of documents or information protected by the attorney-client privilege or the work-product doctrine. Without waiving said objections DVL ceased to exist at time period prior to January 1, 2000 and as such does not possess any responsive documents.

Respectfully submitted,

Dated: June, 2004

VIRGINIA I. MILLER
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202
Attorneys of DEPONENT

CERTIFICATE OF SERVICE

I hereby certify that at my direction a true and correc copy of the Responses and Objection To Subpoena In A Investigation/Adversary Proceeding to John J. Koresko, Es quire Dated February 4, 2004 was served this date, via han delivery, as follows:

MABEL L. CAPOLONGO
Regional Director, US DOL
Employee Benefits Security Administration
The Curtis Center Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317

Dated: June, 2004 By: _____

Virginia I. Miller

CERTIFICATE OF SERVICE

I hereby certify that at my direction a true and correct copy of the Third Affidavit of Virginia Miller in Support of the Response to Petition to Enforce and accompanying Memorandum of Law; were served this date, via facsimile (without exhibits) and hand delivery, as follows:

NATALIE APPETTA
Staff Attorney, US DOL
The Curtis Center Suite 630 East
170 S. Independence Mall West
Philadelphia, PA 19106-3317

Dated: June 16, 2004 By: _____

Virginia I. Miller

APPENDIX P – OBJECTIONS TO SUBPOENAS, DATED MARCH 8, 2004

ANDERSON KILL & GLICK, P.C.
Virginia I. Miller
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

ATTORNEYS FOR PENNMONT BENEFIT SERVICES INC. ("PENN-MONT"); REGIONAL EMPLOYERS' AS SURANCE LEAGUES VOLUNTARY EMPLOYEES BENEFICIARY ASSOCIATION TRUST ("REAI VEBA"); JOHN J. KORESKO V. ("ATTORNEY KORE SKO"); DELAWARE VALLEY LEAGUE ("DVL"); KORESKO & ASSOCIATES, P.C. ("KAPC") (collectively "DEPONENTS").

In re

REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION HEALTH AND WELFARE BENEFIT PLAN — DOL Case

OBJECTION TO SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO PENN-MONT BENEFIT SERVICES, INC. DATED FEBRUARY 4, 2004

PENN-MONT BENEFIT SERVICES, INC. ("PENN-MONT" or DEPONENT"), by its undersigned counsel, hereby objects to the Subpoena In An Investigation/Adversary Proceeding to PENNMONT BENEFIT

SERVICES, INC. dated February 4, 2004 (the "Subpoena") served by the U.S. Department of Labor ("DOL"). These Objections apply to all identical subpoenas similarly dated and served on DEPONENTS. The objections are as follows:

1. The DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rules which DOL has violated in this instance.

2. The information requested by DOL is overboard and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

3. DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.

4. DEPONENT objects based on attorney-client privilege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.

5. The DOL request for documents and information is counter to the DOL's position on multiple employer trusts ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A. Oct. 31, 1996)); MDPhysicians & Associates Inc. v. State Board Insurance, 957 F.2d 178 (5th Cir. 1992)(Amicus Cu

riae – U.S. Secretary Of Labor), Taggat Corp., et al. v. Lif & Health Benefits Admin. Inc. et al., 617 F.2d 1208, 121 (5th Cir. 1980); Donovan v. Dillingham, 688 F.2d 1367 (11 Cir. 1982); Finderne Management Company, Inc. v. Barret 355 N.J. Super. 170, 809 A.2d 842 (N.J.Super.App.Div 11/20/2002) (Amicus Curiae United States Department c Labor).

6. The DOL is trying to do discovery for an on-going lit gation styled *REAL VEBA, et al . v. Sidney Charles Market. et al,* (E.D. Pa). In the case of a live judicial controversy KORESKO as attorney of record and the other DEPC NENTS claim attorney-client privilege and litigation priv lege as to those files. Certain records, which are publi documents, produced in those cases will be produced at th offices of the DEPONENTS'; attorney of record as state below.

7. Furthermore, it is clear that the REAL VEBA has com plied with the law, or else the two district court involve would have given them, as parties, relief requested.

8. In addition, DEPONENT considers this a gross abuse c authority which is designed to circumvent the privilege claimed in previous depositions held in the *Sidney Charle Markets* cases. On information and belief, DOL is aware c those depositions and assertions of privilege from the com plainant.

9. ERISA provides that any administrative subpoena has t be related to information that would be reportable to DOI None of the information DOL has subpoenaed is reportabl to DOL. First, REAL VEBA is not a MEWA. Second, ther is an administrative exemption for insurance-only plans.

Under sec. 512 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 need be filed. Life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a 5500 filing. Since no information related to Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 512.

10. DEPONENT objects as Sec. 512 further states that DOL can make any information public and such public disclosure conflicts with privacy legislation and any other rule of discovery protection. The ERISA section gives DOL the authority to re-publish all information that DOL receives. Such authority would breach privilege and work product protections. First, much of the info they request is tax return information, which DEPONENTS are barred form disclosing by the Internal Revenue Code. Additionally, DOL requests confidential business records, which are protectable from disclosure. The law firm currently possesses certain of the requested records, and they will not be disclosed pursuant to attorney-client privilege. As to the insurance contracts, in all REAL VEBA participation agreements, DEPONENTS are listed as attorney-in-fact to which DEPONENTS assert privilege. The life insurance records contain info protected by privacy legislation and attorney-client privilege. To certain of these records, DEPONENTS have asserted privilege in the *Sidney Charles Markets* case.

11. The current ERISA rules for re-publication of information would also result in a violation of the HIPPA privacy rules.

12. HIPPA indirectly repealed part of ERISA 512 that th DOL is invoking.

13. The current ERISA rules for re-publication of informa tion would also result in no protection for trade secrets. Ab sent a signed Confidentiality Agreement, DEPONEN cannot and will provide such information.

14. The DOL has not met its burden regarding requesting o information by establishing that there is a MEWA that DOI may regulate. DOL must first satisfy a preliminary test t determine whether there is any employer or employee con trol. DEPONENTS already provide that information in previous response to DOL's investigator. Under previou DOL advisory letters, DOL has refused to say that the con trol requirement in VEBA, IRC 501 (c)(9), which is satisfie by an independent trustee, makes a VEBA an "employee beneficiary association" for "purposes of ERISA. DOL ha refused to issue any regulations. In the absence of authority and their previous rulings on organizations similar to REAI VEBA, DEPONENTS are absolutely justified in maintainin that DOL has no jurisdiction. DOL has admitted such and i estopped by such position. DOL's previous position impli cates judicial estoppel.

15. All records requested from the entities subpoenaed ar the property of the law firm of Koresko & Associates, P.C ("KAPC"). KAPC is claiming all records as work product o privileged information.

16. Notice 95-34, issued by the Internal Revenue Service i 1995, was a clear statement of intent to litigate the issues in cluded in the information sought by the DOL. DEPONEN claims the files as work product on the basis that all infor

mation requested was assembled under the threat of and in anticipation of litigation, as well.

17. The Subpoena violated the DEPONENT's rights, including: the the right to privacy under the United States Constitution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to confront accusers; and a right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM case. Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

18. DOL has failed to provide a witness fee pursuant to the Federal Rules.

19. DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not permitted without some probable cause. Such request in and of itself would cost DEPONENT thousands of dollars in time and actual reproduction costs, and is therefore clearly unreasonable in the absence of a jurisdictional predicate.

20. DOL request that DEPONENT reproduce all financial data prior to 1999 -- this information is lost due to hard drive crashes that were previously reported to the United States Attorney's office in connection with an investigation (of someone else) DEPONENT is cooperating with.

21. DEPONENT, as litigant or counsel in on-going litigation, has the right to find out if DOL is being used by Sidney Charles Markets, as that goes to the "rightfulness" of the subpoena. If the DOL is interfering in litigation, DEPONENT has the right and authority to fight the subpoena simply on that basis, and assert that the procedures of the Court

vested with jurisdiction in that matter and the discovery prc visions of the Federal Rules take precedence.

22. Under New York State Bar Association v. Federal Trad Commission, No. 02-810 (D.D.C. 2003), the regulation c activities attorneys is constitutionally vested in the Suprem Courts of the various States and the Judicial Branch of th Federal Government under Article III of the Constitutior and such regulatory authority supercedes that of the Federa Trade Commission, and therefore, the Department of Labor.

23. Any disclosure, if ever agreed to by DEPONENT, will b done on a plan by plan basis, based upon full disclosure of a actual complaint, as DOL only has authority over plans, nc the REAL VEBA trust.

24. Based upon the totality of the objections to this sut poena, DEPONENT believes that this administrative sut poena has been issued with improper purpose.

25. Based upon the totality of the objections to this sut poena, DEPONENT believes there is no probable cause t suspect a violation of ERISA and demands further proo DEPONENT gave various information to the U.S. attorne and DOL investigator last year.

26. Although under no obligation to do because of the previ ous objections, DEPONENT agrees to produce at the office of its counsel of record at the below address the *Sidne Charles Markets* pleadings as these are public records. SCM waived their privilege as to these documents. These docu ments are a sample of the documents subpoenaed. SCM wa never in REAL VEBA, so SCM has no standing to waive

such privilege and to DEPONENT's knowledge, no other REAL VEBA participant has waived such privilege.

Respectfully submitted,

Dated: March, 8, 2004

VIRGINIA I. MILLER

ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

Attorneys for DEPONENT

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Virginia I. Miller
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

ATTORNEYS FOR PENNMONT BENEFIT SERVICES INC. ("PENN-MONT");
REGIONAL EMPLOYERS' ASSURANCE LEAGUE VOLUNTARY EMPLOYEES'
BENEFICARY ASSOCIATION TRUST ("REAL VEBA trust");
REGIONAL EMPLOYERS' ASSURANCE LEAGUE (REAL VEBA");
JOHN J. KORESKO V. ("ATTORNEY KORESKO");
DELAWARE VALLEY LEAGUE ("DVL");
KORESKO & ASSOCIATES, P.C. ("KAPC")
(collectively "DEPONENTS").

In re

REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION HEALTH AND WELFARE BENEFIT PLAN — DOL Cas

OBJECTION TO SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY

EMPLOYEES' BENEFICIARY ASSOCIATION TRUST DATED FEBRUARY 4, 2004

REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUST ("REAL VEBA trust" or "DEPONENT"), by its undersigned counsel, hereby objects to the Subpoena In An Investigation/Adversary Proceeding To REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUST dated February 4, 2004 (the "Subpoena") served by the U.S. Department of Labor ("DOL"). These Objections apply to all identical subpoenas similarly dated and served on DEPONENTS. The objections are as follows:

1. The DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rule which DOL has violated in this instance.

2. The information requested by DOL is overboard and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

3. DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.

4. DEPONENT objects based on attorney-client privilege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.

5. The DOL request for documents and information is counter to the DOL's position on multiple employer trusts

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7. Furthermore, it is clear that the REAL VEBA has com
plied with the law, or else the two district courts involve
would have given them, as parties, relief requested.

8. In addition, DEPONENT considers this a gross abuse of authority which is designed to circumvent the privileges claimed in previous depositions held in the *Sidney Charles Markets* cases. On information and belief, DOL is aware of those depositions and assertions of privilege from the complainant.

9. ERISA provides that any administrative subpoena has to be related to information that would be reportable to DOL. None of the information DOL has subpoenaed is reportable to DOL. First, REAL VEBA is not a MEWA. Second, there is an administrative exemption for insurance-only plans. Under sec. 512 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. REAL VEBA is not a MEWA, according to DOL, so on Form 5500 need be filed. Life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 512.

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11. The current ERISA rules for re-publication of inform tion would also result in a violation of the HIPPA privac rules.

12. HIPPA indirectly repealed part of ERISA 512 that th DOL is invoking.

13. The current ERISA rules for re-publication of inform tion would also result in no protection for trade secrets. Al sent a signed Confidentiality Agreement, DEPONEN cannot and will provide such information.

14. The DOL has not met its burden regarding requesting information by establishing that there is a MEWA that DO may regulate. DOL must first satisfy a preliminary test determine whether there is any employer or employee co trol. DEPONENTS already provided that information in previous response to DOL's investigator. Under previo DOL advisory letters, DOL has refused to say that the co trol requirement in VEBA, IRC 501(c)(9), which is satisfie by an independent trustee, makes a VEBA an "employe beneficiary association" for purposes of ERISA. DOL h refused to issue any regulations. In the absence of authorit and their previous rulings on organizations similar to REA VEBA, DEPONENTS are absolutely justified in maintainin

that DOL has no jurisdiction. DOL has admitted such and is estopped by such position. DOL's previous position implicates judicial estoppel.

15. All records requested from the entities subpoenaed are the property of the law firm of Koresko & Associates, P.C. ("K&A"). K&A is claiming all records as work product or privileged information.

16. Notice 95-34, issued by the Internal Revenue Service in 1995, was a clear statement of intent to litigate the issues included in the information sought by the DOL. DEPONENT claims the files as work product on the basics that all information requested was assembled under the threat of and in anticipation of litigation, as well.

17. The Subpoena violates the DEPONENT's rights, including: the right to privacy under the United States Constitution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to confront accusers as DOL has refused to provided any information on the accusations or accusers; and a right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM case. Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

18. DOL has failed to provide a witness fee pursuant to the Federal Rules.

19. DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not permitted without some probable cause. Such request in and of itself would cost DEPONENT thousands of dollars in time

and actual reproduction costs, and is therefore clearly unrea sonable in the absence of a jurisdictional predicate.

20. DOL requests that DEPONENT reproduce all financia data prior to 1999 -- this information is lost due to hard driv crashes that were previously reported to the United State Attorney's office in connection with an investigation (c someone else) DEPONENT is cooperating with.

21. DEPONENT, as litigant or counsel in on-going litigatior has the right to find out if DOL is being used by Sidne Charles Markets, as that goes to the "rightfulness" of th subpoena. If the DOL is interfering in litigation, DEPC NENT has the right and authority to fight the subpoena sim ply on the basis, and assert that the procedures of the Cou vested with jurisdiction in that matter and the discovery prc visions of the Federal Rules take precedence.

22. Under New York State Bar Association v. Federal Trad Commission, No. 02-810 (D.D.C. 2003), the regulation c activities of attorneys is constitutionally vested in the Su preme Courts of the various States and the Judicial Branch c the Federal Government under Article III of the Constitutior and such regulatory authority supercedes that of the Federa Trade Commission, and therefore, the Department of Labor.

23. Any disclosure, if ever agreed to by DEPONENT, will b done on a plan by plan basis, based upon full disclosure of a actual complaint, as DOL only has authority over plans, nc the REAL VEBA trust.

24. Based upon the totality of the objections to this sub poena, DEPONENT believes that this administrative sub poena has been issued with improper purposes.

25. Based upon the totality of the objections to this subpoena, DEPONENT believes there is no probable cause to suspect a violation of ERISA and demands further proof. DEPONENT gave various information to the U.S. attorney and DOL investigator last year.

26. Although under no obligation to do because of the previous objections, DEPONENT agrees to produce at the offices of its counsel of record at the below address the *Sidney Charles Markets* pleadings as these are public records. SCM waived their privilege as to these documents. These documents are a sample of the documents subpoenaed. SCM was never in REAL VEBA, so SCM has no standing to waive such privilege and to DEPONENT's knowledge, no other REAL VEBA participant has waived such privilege.

Respectfully submitted,

Dated: March 8, 2004

VIRGINIA I. MILLER
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Attorneys for DEPONENT

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ATTORNEYS FOR PENNMONT BENEFIT SERVICES INC. ("PENN-MONT")
REGIONAL EMPLOYERS' ASSURANCE LEAGUE VOLUNTARY EMPLOYEES'
BENEFICARY ASSOCIATION TRUST ("REAL VEBA trust")
REGIONAL EMPLOYERS' ASSURANCE LEAGUE (REAL VEBA")
JOHN J. KORESKO V. ("ATTORNEY KORESKO")
DELAWARE VALLEY LEAGUE ("DVL")
KORESKO & ASSOCIATES, P.C. ("KAPC")
(collectively "DEPONENTS")

In re	
REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION HEALTH AND WELFARE	DOL Case

BENEFIT PLAN

OBJECTION TO SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO REGIONAL EMPLOYERS' ASSURANCE LEAGUES DATED FEBRUARY 4, 2004

REGIONAL EMPLOYERS' ASSURANCE LEAGUES ("REAL VEBA" or "DEPONENT"), by its undersigned counsel, hereby objects to the Subpoena In An Investigation/Adversary Proceeding To REGIONAL EMPLOYERS' ASSURANCE LEAGUES dated February 4, 2004 (the "Subpoena") served by the U.S. Department of Labor ("DOL"). These Objections apply to all identical subpoenas similarly dated and served on DEPONENTS. The objections are as follows:

1. The DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rules which DOL has violated in this instance.

2. The information requested by DOL is overbroad and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

3. DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.

4. DEPONENT objects based on attorney-client privilege HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.

5. The DOL request for documents and information is counter to the DOL's position on multiple employer trust ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. Gruber v. Hubbard Berg Karle Weber, Inc., 159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A. Oct. 31, 1996)); MDPhysicians & Associates Inc. v. State Board of Insurance, 957 F.2d 178 (5th Cir. 1992) (Amicus Curiae – U.S. Secretary Of Labor), Taggart Corp., et al v. Life & Health Benefits Admin. Inc., et al., 617 F.2d 1208, 1210 (5th Cir. 1980); Donovan v. Dillingham, 688 F2d 1367 (11th Cir. 1982); Finderne Management Company, Inc. v. Barrett, 355 N.J.Super 170, 809 A.2d 842 (N.J. Super.App.Div. 11/20/2002) (Amicus Curiae United States Department of Labor).

6. The DOL is trying to do discovery for an on-going litigation styled *REAL VEBA, et al v. Sidney Charles Markets, et al,* (E.D. Pa). In case of a live judicial controversy, KORESKO as attorney of record and the other DEPONENTS claim attorney-client privilege and litigation privilege as to those files. Certain records, which are public documents, produced

in those cases will be produced at the offices of the DEPONENTS' attorney of record as stated below.

7. Furthermore, it is clear that the REAL VEBA has complied with the law, or else the two district courts involved would have given them, as parties, relief requested.

8. In addition, DEPONENT considers this a gross abuse of authority which is designed to circumvent the privileges claimed in previous depositions held in the *SidneyCharles Markets* cases. On information and belief, DOL is aware of those depositions and assertion of privilege from the complainant.

9. ERISA provides that any administrative subpoena has to be related to information that would be reportable to DOL. None of the information DOL has subpoenaed is reportable to DOL. First, REAL VEBA is not a MEWA. Second, there is an administrative exemption for insurance-only plans. Under sec. 512 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. REAL VEBA is not a MEWA, according to DOL, so no Form 5500 need be filed. Life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 512

10. DEPONENT objects as Sec. 512 further states that DOL can make any information public and such public disclosure conflicts with privacy legislation and any other rule of discovery protection. The ERISA section give DOL the authority to re-publish all information that DOL receives. Such authority would breach privilege and work product protect

tions. First, much of the info they request is tax return ir formation, which DEPONENTS are barred from disclosin by the Internal Revenue Code. Additionally, DOL request confidential business records, which are protectable fror disclosure. The law firm currently possesses certain of th requested records, and they will not be disclosed pursuar attorney-client privilege. As to the insurance contracts, in a REAL VEBA participation agreements, DEPONENTS ar listed as attorney-in-fact to which DEPONENTS assert privi lege. The life insurance records contain info protected b privacy legislation and attorney-client privilege. To certai of these records, DEPONENTS have asserted privilege in th *Sidney Charles Markets* case.

11. The current ERISA rules for re-publication of informa tion would also result in a violation of the HIPPA privac rules.

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15. All records requested from the entities subpoenaed are the property of the law firm of Koresko & Associates, P.C. ("K&A"). K&A is claiming all records as work product or privileged information.

16. Notice 95-34, issued by the Internal Revenue Service in 1995, was a clear statement of intent to litigate the issues included in the information sought by the DOL. DEPONENT claims the files as work product on the basis that all information requested was assembled under the threat of and in anticipation of litigation, as well.

17. The Subpoena violates the DEPONENT's rights, including: the right to privacy under the United States Constitution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM case. Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

18. DOL has failed to provide a witness fee pursuant to the Federal Rules.

19. DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not

permitted without some probable cause. Such request in an
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the REAL VEBA trust.

24. Based upon the totality of the objections to this subpoena, DEPONENT believes that this administrative subpoena has been issued with improper purpose.

25. Based upon the totality of the objections to this subpoena, DEPONENT believes there is no probable cause to suspect a violation of ERISA and demands further proof. DEPONENT gave various information to the U.S. attorney and DOL investigator last year.

26. Although under no obligation to do because of the previous objections, DEPONENT agrees to produce at the offices of its counsel of record at the below address the *Sidney Charles Markets* pleadings as these are public records. SCM waived their privilege as to these documents. These documents are a sample of the documents subpoenaed. SCM was never in REAL VEBA, so SCM has no standing to waive such privilege and to DEPONENT's knowledge, no other REAL VEBA participant has waived such privilege.

Respectfully submitted,

Dated: March 8, 2004

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ATTORNEYS FOR PENNMONT BENEFIT SERVICES INC. ("PENN-MONT");
REGIONAL EMPLOYERS' ASSURANCE LEAGUE VOLUNTARY EMPLOYEES'
BENEFICARY ASSOCIATION TRUST ("REAL VEBA trust");
REGIONAL EMPLOYERS' ASSURANCE LEAGUE (REAL VEBA");
JOHN J. KORESKO V. ("ATTORNEY KORESKO");
DELAWARE VALLEY LEAGUE ("DVL");
KORESKO & ASSOCIATES, P.C. ("KAPC")
(collectively "DEPONENTS").

In re

REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION HEALTH AND WELFARE BENEFIT PLAN — DOL Case

OBJECTION TO SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING
TO JOHN J. KORESKO, V. ESQUIRE DATED FEBRUARY 4, 2004

John J. Korseko, Esquire, ("ATTORNEY KORESKO" or "DEPONENT"), by his undersigned counsel, hereby objects to the Subpoena In An Investigation/Adversary Proceeding To John J. Korekso, Esquire dated February 4, 2004 (the "Subpoena") served by the U.S. Department of Labor ("DOL"). These Objections apply to all identical subpoenas similarly dated and served on ATTORNEY KORESKO relating to his clients. The objections are as follows:

1. DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rules which DOL has violated in this instance.

2. The information requested by DOL is overboard and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

3. DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.

4. DEPONENT objects based on attorney-client privilege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.

5. The DOL request for documents and information is counter to the DOL's position on multiple employer trusts ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of cer

tain provisions exercised herein. Gruber v. Hubbard Be Karle Weber, Inc., 159 F.3d 780 787 (3d. Cir. 1998) (citin DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A Oct. 31, 1996)); MDPhysicians & Associates Inc. v. Stat Board of Insurance, 957 F.2d 178 (5th Cir. 1992) (Amicu Curiae – U.S. Secretary Of Labor), Taggart Corp., et al v Life & Health Benefits Admin. Inc., et al., 617 F.2d 1208 1210 (5th Cir. 1980); Donovan v. Dillingham, 688 F.2d 136 (11th Cir. 1982); Finderne Management Company, Inc. v Barrett, 355 N.J. Super. 170, 809 A.2d 842 (N.J. Su per.App.Div. 11/20/2002) (Amicus Curiae United States De partment of Labor).

6. The DOL is trying to do discovery for an on-going litiga tion styled *REAL VEBA, et al v. Sidney Charles Markets, e al,* (E.D. Pa). In the case of a live judicial controversy, KO RESKO as attorney of record and the other DEPONENTS claim attorney-client privilege and litigation privilege as t those files. Certain records, which are public documents produced in those cases will be produced at the offices of th DEPONENTS' attorney of record as stated below.

7. Furthermore, it is clear that the REAL VEBA has com plied with the law, or else the two district courts involve would have given them, as parties, relief requested.

8. In addition, DEPONENT considers this a gross abuse o authority which is designed to circumvent the privilege claimed in previous depositions held in the *Sidney Charle Markets* cases. On information and belief, DOL is aware o those deposition and assertions of privilege from the com plainant.

9. ERISA provides that any administrative subpoena has to be related to information that would be reportable to DOL. None of the information DOL has subpoenaed is reportable to DOL. First, REAL VEBA is not a MEWA. Second, there is an administrative exemption for insurance-only plans. Under sec. 512 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. REAL VEBA is not a MEWA, according to DOL, so on Form 5500 need be filed. Life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 512.

10. DEPONENT objects as Sec. 512 further states that DOL can make any information public and such public disclosure conflicts with privacy legislation and any other rule of discovery protection. The ERISA section gives DOL the authority to re-publish all information that DOL receives. Such authority would breach privilege and work product protections. First, much of the info they request is tax return information, which DEPONENTS are barred from disclosing by the Internal Revenue Code. Additionally, DOL requests confidential business records, which are protectable from disclosure. The law firm currently possesses certain of the requested records, and they will not be disclosed pursuant to attorney-client privilege. As to the insurance contracts, in all REAL VEBA participation agreements, DEPONENTS are listed as attorney-in-fact to which DEPONENTS assert privilege. The life insurance records contain info protected by privacy legislation and attorney-client privilege. To certain

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15. All records requested from the entities subpoenaed are the property of the law firm of Koresko & Associates, P.C.

("K&A"). K&A is claiming all records as work product or privileged information.

16. Notice 95-34, issued by the Internal Revenue Service in 1995, was a clear statement of intent to litigate the issues included in the information sought by the DOL. DEPONENT claims the files as work product on the basis that all information requested was assembled under the threat of and in anticipation of litigation, as well.

17. The Subpoena violates the DEPONENT's rights, including: the right to privacy under the United States Constitution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to confront accusers as DOL has refused to provided any information on the accusations or accusers; and a right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM case. Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

18. DOL has failed to provide a witness fee pursuant to the Federal Rules.

19. DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not permitted without some probable cause. Such request in and of itself would cost DEPONENT thousand of dollars in time and actual reproduction costs, and is therefore clearly unreasonable in the absence of a jurisdiction predicate.

20. DOL requests that DEPONENT reproduce all financial data prior to 1999 -- this information is lost due to hard drive

crashes that were previously reported to the United State Attorney's office in connection with an investigation (c someone else) DEPONENT is cooperating with.

21. DEPONENT, as litigant or counsel in on-going litigatior has the right to find out if DOL is being used by Sidne Charles Markets, as that goes to the "rightfulness" of th subpoena. If the DOL is interfering in litigation, DEPO NENT has the right and authority to fight the subpoena sim ply on that basis, and assert that the procedures of the Cou vested with jurisdiction in that matter and the discovery pro visions of the Federal Rules take precedence.

22. DEPONENT, as an attorney at law with an outstandin reputation in the community, has the right to protect tha reputation from negative implications that could result fron the DOL' s policies and procedures with respect to adminis trative subpoenas.

23. Under New York State Bar Association v. Federal Trad Commission, No. 02-810 (D.D.C. 2003), the regulation o activities of attorneys is constitutionally vested in the Su preme Courts of the various States and the Judicial Branch o the Federal Government under Article III of the Constitution and such regulatory authority supercedes that of the Federa Trade Commission, and therefore, the Department of Labor.

24. Any disclosure, if ever agreed to by DEPONENT, will b done on a plan by plan basis, based upon full disclosure of a actual complaint, as DOL only has authority over plans, no the REAL VEBA trust.

25. Based upon the totality of the objections to this subpoena, DEPONENT believes that this administrative subpoena has been issued with improper purpose.

26. Based upon the totality of the objections to this subpoena, DEPONENT believes there is no probable cause to suspect a violation of ERISA and demands further proof. DEPONENT gave various information to the U.S. attorney and DOL investigator last year.

27. Although under no obligation to do because of the previous objections, DEPONENT agrees to produce at the offices of its counsel of record at the below address the *Sidney Charles Markets* pleadings as these are public records. SCM waived their privileges as to these documents. These documents are a sample of the documents subpoenaed. SCM was never in REAL VEBA, so SCM has no standing to waive such privilege and to DEPONENT's knowledge, no other REAL VEBA participant has waived such privilege.

Respectfully submitted,

Dated: March 8, 2004

VIRGINIA I. MILLER
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Attorneys for DEPONENT

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ATTORNEYS FOR PENNMONT BENEFIT SERVICES INC. ("PENN-MONT");
REGIONAL EMPLOYERS' ASSURANCE LEAGUE VOLUNTARY EMPLOYEES'
BENEFICARY ASSOCIATION TRUST ("REAL VEBA trust");
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JOHN J. KORESKO V. ("ATTORNEY KORESKO");
DELAWARE VALLEY LEAGUE ("DVL");
KORESKO & ASSOCIATES, P.C. ("KAPC")
(collectively "DEPONENTS").

In re

REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION HEALTH AND WELFARE BENEFIT PLAN — DOL Cas

OBJECTION TO SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO DELAWARE VALLEY LEAGUE DATED FEBRUARY 4, 2004

DELAWARE VALLEY LEAGUE ("DVL" or "DEPONENT"), by its undersigned counsel, hereby objects to the Subpoena In An Investigation/Adversary Proceeding To DELAWARE VALLEY LEAGUE dated February 4, 2004 (the "Subpoena") served by the U.S. Department of Labor ("DOL"). These Objections apply to all identical subpoenas similarly dated and served on DEPONENTS. The objections are as follows:

1. The DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rules which DOL has violated in this instance.

2. The information requested by DOL is overbroad and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

3. DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.

4. DEPONENT objects based on attorney-client privilege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.

5. The DOL request for documents and information is counter to the DOL's position on multiple employer trusts ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. Gruber v. Hubbard Bert

Karle Weber, Inc., 159 F.3d 780, 787 (3d Cir. 1998) (citin DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A Oct. 31, 1996)); MDPhysicians & Associates Inc. v. Stat Board of Insurance, 957 F.2d 178 (5th Cir. 1992) (Amicu Curiae – U.S. Secretary Of Labor), Taggart Corp., et al Life & Health Benefits Admin. Inc., et al., 617 F.2d 120 1210 (5th Cir. 1980); Donovan v. Dillingham, 688 F2d 136 (11th Cir. 1982); Finderne Management Company, Inc. Barrett, 355 N.J.Super 170, 809 A.2d 842 (N.J. Su per.App.Div. 11/20/2002) (Amicus Curiae United States De partment of Labor).

6. The DOL is trying to do discovery for an on-going litiga tion styled *REAL VEBA, et al v. Sidney Charles Markets, et al,* (E.D. Pa). In case of a live judicial controversy, KORE SKO as attorney of record and the other DEPONENTS clain attorney-client privilege and litigation privilege as to thos files. Certain records, which are public documents, produce in those cases will be produced at the offices of the DEPO NENTS' attorney of record as stated below.

7. Furthermore, it is clear that the REAL VEBA has com plied with the law, or else the two district courts involve would have given them, as parties, relief requested.

8. In addition, DEPONENT considers this a gross abuse o authority which is designed to circumvent the privilege claimed in previous depositions held in the *Sidney Charle Markets* cases. On information and belief, DOL is aware o those depositions and assertions of privilege from the com plainant.

9. ERISA provides that any administrative subpoena has t be related to information that would be reportable to DOL.

None of the information DOL has subpoenaed is reportable to DOL. First, REAL VEBA is not a MEWA. Second, there is an administrative exemption for insurance-only plans. Under sec. 512 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. REAL VEBA is not a MEWA, according to DOL, so on Form 5500 need be filed. Life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 512.

10. DEPONENT objects as Sec. 512 further states that DOL can make any information public and such public disclosure conflicts with privacy legislation and any other rule of discovery protection. The ERISA section give DOL the authority to re-publish all information that DOL receives. Such authority would breach privilege and work product protections. First, much of the info they request is tax return information, which DEPONENTS are barred from disclosing by the Internal Revenue Code. Additionally, DOL requests confidential business records, which are protectable from disclosure. The law firm currently possesses certain of the requested records, and they will not be disclosed pursuant attorney-client privilege. As to the insurance contracts, in all REAL VEBA participation agreements, DEPONENTS are listed as attorney-in-fact to which DEPONENTS assert privilege. The life insurance records contain info protected by privacy legislation and attorney-client privilege. To certain of these records, DEPONENTS have asserted privilege in the *Sidney Charles Markets* case.

11. The current ERISA rules for re-publication of inform tion would also result in a violation of the HIPPA privac rules.

12. HIPPA indirectly repealed part of ERISA 512 that th DOL is invoking.

13. The current ERISA rules for re-publication of inform tion would also result in no protection for trade secrets. Al sents a signed Confidentiality Agreement, DEPONEN cannot and will provide such information.

14. The DOL has not met its burden regarding requesting information by establishing that there is a MEWA that DO may regulate. DOL must first satisfy a preliminary test determine whether there is any employer or employee co trol. DEPONENTS already provided that information in previous response to DOL's investigator. Under previo DOL advisory letters, DOL has refused to say that the co trol requirement in VEBA, IRC 501 (c)(9), which is satisfi by an independent trustee, makes a VEBA an "employe beneficiary association" for purposes of ERISA. DOL h refused to issue any regulations. In the absence of authorit and their previous rulings on organizations similar to REA VEBA, DEPONENTS are absolutely justified in maintainir that DOL has no jurisdiction. DOL has admitted such and estopped by such position. DOL' previous position impl cates judicial estoppel.

15. All records requested from the entities subpoenaed a the property of the law firm of Koresko & Associates, P. ("K&A"). K&A is claiming all records as work product privileged information.

16. Notice 95-34, issued by the Internal Revenue Service in 1995, was a clear statement of intent to litigate the issues included in the information sought by the DOL. DEPONENT claims the files as work product on the basis that all information requested was assembled under the threat of and in anticipation of litigation, as well.

17. The Subpoena violates the DEPONENT's rights, including: the right to privacy under the United States Constitution; the right not to have his or his clients' civil rights violated under 42 USC sec. 1983; the right to confront accusers as DOL has refused to provided any information on the accusations or accusers; and a right to prevent DOL from subverting the litigation process DEPONENT is enduring in the SCM case. Furthermore, DOL is in deviation from its own enforcement procedure published in its manuals.

18. DOL has failed to provide a witness fee pursuant to the Federal Rules.

19. DOL requests that DEPONENT reproduce thousands of individual policy files. This request is oppressive and not permitted without some probable cause. Such request in and of itself would cost DEPONENT thousands of dollars in time and actual reproduction costs, and is therefore clearly unreasonable in the absence of a jurisdictional predicate.

20. DOL requests that DEPONENT reproduce all financial data prior to 1999 -- this information is lost due to hard drive crashes that were previously reported to the United States Attorney's office in connection with an investigation (of someone else) DEPONENT is cooperating with.

21. DEPONENT, as litigant or counsel in on-going litigatio has the right to find out if DOL is being used by Sidne Charles Markets, as that goes to the "rightfulness" of th subpoena. If the DOL is interfering in litigation, DEPC NENT has the right and authority to fight the subpoena sim ply on the basis, and assert that the procedures of the Cou vested with jurisdiction in that matter and the discovery pr visions of the Federal Rules take precedence.

22. Under New York State Bar Association v. Federal Trad Commission, No. 02-810 (D.D.C. 2003), the regulation c activities attorneys is constitutionally vested in the Suprem Courts of the various States and the Judicial Branch of th Federal Government under Article III of the Constitutio and such regulatory authority supercedes that of the Feder Trade Commission, and therefore, the Department of Labor.

23. Any disclosure, if ever agreed to by DEPONENT, will b done on a plan by plan basis, based upon full disclosure of a actual complaint, as DOL only has authority over plans, n the REAL VEBA trust.

24. Based upon the totality of the objections to this sul poena, DEPONENT believes that this administrative sul poena has been issued with improper purpose.

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26. Although under no obligation to do because of the previous objections, DEPONENT agrees to produce at the offices of its counsel of record at the below address the *Sidney Charles Markets* pleadings as these are public records. SCM waived their privilege as to these documents. These documents are a sample of the documents subpoenaed. SCM was never in REAL VEBA, so SCM has no standing to waive such privilege and to DEPONENT's knowledge, no other REAL VEBA participant has waived such privilege.

Respectfully submitted,

Dated: March, 8, 2004

VIRGINIA I. MILLER
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(215) 568-4202

Attorneys for DEPONENT

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ATTORNEYS FOR PENNMONT BENEFIT SERVICES INC. ("PENN-MONT")
REGIONAL EMPLOYERS' ASSURANCE LEAGUE VOLUNTARY EMPLOYEES'
BENEFICARY ASSOCIATION TRUST ("REAL VEB trust")
REGIONAL EMPLOYERS' ASSURANCE LEAGUE (REAL VEBA")
JOHN J. KORESKO V. ("ATTORNEY KORESKO")
DELAWARE VALLEY LEAGUE ("DVL")
KORESKO & ASSOCIATES, P.C. ("KAPC")
(collectively "DEPONENTS")

In re

REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION HEALTH AND WELFARE BENEFIT PLAN — DOL Cas

OBJECTION TO SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO KORESKO & ASSOCIATES, P.C. DATED FEBRUARY 4, 2004

KORESKO & ASSOCIATES, P.C. ('KAPC" or "DEPONENT"), by its undersigned counsel, hereby objects to the Subpoena In An Investigation/Adversary Proceeding To KORESKO & ASSOCIATES, P.C. dated February 4, 2004 (the "Subpoena") served by the U.S. Department of Labor ("DOL"). These Objection apply to all identical subpoenas similarly dated and served on KAPC relating to its clients. The objections are as follows:

1. DOL subpoena process is based by statute on the FTC process. These processes are governed by the Federal Rules which DOL has violated in this instance.

2. The information requested by DOL is overboard and unduly burdensome, massive, outrageous, oppressive, and clearly vindictive discovery for an improper purpose.

3. DEPONENT has previously responded to similar DOL requests as to make certain requests duplicative.

4. DEPONENT objects based on attorney-client privilege, HIPPA and FTC privacy rules, recent cases absolving lawyers from FTC regulation, work product, and that DOL has not satisfied the standard for jurisdiction and rightfulness of the subpoena.

5. The DOL request for documents and information is counter to the DOL's position on multiple employer trust ("MET") that has been restated numerous times since 1984. See, e.g. DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers or employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. Gruber v. Hubbard Bert

Karle Weber, Inc., 159 F.3d 780 787 (3d. Cir. 1998) (citir DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A Oct. 31, 1996)); MDPhysicians & Associates Inc. v. Sta Board of Insurance, 957 F.2d 178 (5th Cir. 1992) (Amici Curiae – U.S. Secretary Of Labor), Taggart Corp., et al Life & Health Benefits Admin. Inc., et al., 617 F.2d 120 1210 (5th Cir. 1980); Donovan v. Dillingham, 688 F.2d 13((11th Cir. 1982); Finderne Management Company, Inc. Barrett, 355 N.J. Super. 170, 809 A.2d 842 (N.J. Si per.App.Div. 11/20/2002) (Amicus Curiae United States D partment of Labor).

6. The DOL is trying to do discovery for an on-going litig tion styled *REAL VEBA, et al v. Sidney Charles Markets, al,*(E.D. Pa). In the case of a live judicial controversy, K(RESKO as attorney of record and the other DEPONENT claim attorney-client privilege and litigation privilege as those files. Certain records, which are public document produced in those cases will be produced at the offices of tl DEPONENTS' attorney of record as stated below.

7. Furthermore, it is clear that the REAL VEBA has cor plied with the law, or else the two district courts involv(would have given them, as parties, relief requested.

8. In additions, DEPONENT consider this a gross abuse authority which is designed to circumvent the privileg claimed in previous depositions held in the *Sidney Charl Markets* cases. On information and belief, DOL is aware those depositions and assertions of privilege from the cor plainant.

9. ERISA provides that any administrative subpoena has be related to information that would be reportable to DOL.

None of the information DOL has subpoenaed is reportable to DOL. First, REAL VEBA is not a MEWA. Second, there is an administrative exemption for insurance-only plans. Under sec. 512 of ERISA, DOL is only entitled to get information that relates to items that would be disclosed on a Form 5500 report. REAL VEBA is not a MEWA, according to DOL, so on Form 5500 need be filed. Life insurance plans, such as the ones involved with DEPONENTS, are exempt by regulation from a Form 5500 filing. Since no information related to the Subpoena would be reportable on a Form 5500, there is no investigatory predicate under sec. 512.

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22. DEPONENT, as a law firm with an outstanding reputa tion in the community, has the right to protect that reputatio from negative implication that could result from the DOL' policies and procedures with respect to administrative sub poenas.

23. Under New York State Bar Association v. Federal Trad Commission, No. 02-810 (D.D.C. 2003), the regulation o activities of attorneys is constitutionally vested in the Su preme Courts of the various States and the Judicial Branch o the Federal Government under Article III of the Constitution and such regulatory authority supercedes that of the Federa Trade Commission, and therefore, the Department of Labor.

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Respectfully submitted,

Dated: March 8, 2004

VIRGINIA I. MILLER
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

Attorneys for DEPONENT

CERTIFICATE OF SERVICE

I hereby certify that at my direction a true and correct copy of the Objection To Subpoena In An Investigation/Adversary Proceeding to PENNMONT BENEFIT SERVICES, INC. ("PENN-MONT");REGIONAL EMPLOYERS' ASSURANC LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUST ("REAL VEBA trust");REGIONAL EMPLOYERS' ASSURANCE LEAGUES ("REAL VEBA");JOHN J. KORESKO V. ("ATTORNEY KORESKO"); DELAWARE VALLEY LEAGUE ("DVL"); KORESKO & ASSOCIATES, P.C. ("KAPC") Dated February 4, 2004 was servec this date, via hand delivery, as follows:

MABEL L. CAPOLONGO
Regional Director, US DOL
Employee Benefits Security Adminstration
The Curtis Center Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317

Dated: March 8, 2004

By: _____

Virginia I. Milller

APPENDIX Q – AFFIDAVIT OF JEANNE D. BONNEY, ESQ, DATED JUNE 15, 2001

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL ACTION-LAW

REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUST by PennMont Benefit Services, Inc., Plan Administrator 500 N. Gulph Rd., Suite 110 King of Prussia, PA 19406, *etal.* Plaintiff	:	No. 00-22456
vs.	:	
SIDNEY CHARLES MARKETS, INC. West End Court P.O. Box 3038 Long Branch, NJ 07740, and	:	
MICHAEL ZIMMERMAN West End Court P.O. Box 3038 Long Branch, NJ 07740, and	:	
DOROTHY ZIMMERMAN 717 Ocean Avenue #803 Long Branch, NJ 07440, and	:	
CRAIG WAITT 112 Creek Road Keansberg, NJ 07734	:	

AFFIDAVIT OF JEANNE D. BONNEY, ESQUIRE

I, Jeanne D. Booney, Esquire, being duly sworn according to law, state the following:

1. I am an attorney at law admitted in New Jersey and Pennsylvania.

2. At all times relevant hereto, I was counsel to PennMont Benefit Services, Inc. ("PM") in connection with the matters involving Plaintiffs and Defendants.

3. The documents attached hereto as Exhibits are true and correct copies of documents regarding this matter in the possession of PM.

4. Prior to 1994, Plaintiff Sidney Charles Markets, Inc. ("SCM") adopted a welfare benefit plan under the Southern California Retail Merchants League VEBA Trust ("SoCal VEBA").

5. On or about January 18, 1994, SCM removed California Central Trust Bank ("CalTrust") and named Penn Public Trust, a Pennsylvania nonprofit corporation ("PPT"), Trustee of its welfare benefit plan. [See Exhibits "A and B"].

6. On or about January 18, 1994, SCM directed CalTrust, the trustee of the SoCal VEBA, to transfer three life insurance policies and any other assets of said plan to PPT. [See Exhibit "A"].

7. SCM took the aforesaid actions as part of a tax reduction strategy at the insistence and request of its insurance agent, Barry Shiffman. [See Exhibit "C, p.9, C12"].

8. On or about December 31, 1993, SCM executed Adoption Agreements to join the Delaware Valley League of Merchants North ("League") [See Exhibit "C"] and adopted the League's "Voluntary Employees' Beneficiary Association Health and Welfare Plan [See Exhibit "D"] and its companion Trust [See Exhibit "F"] The Plan and Trust are collectively referred to as the "VEBA".

9. The League VEBA was recognized by the Internal Revenue Service as an exempt organization pursuant to 26 U.S.C. § 501 (c)(9) on March 24, 1994. [See Exhibit "E"].

10. The Adoption Agreement names Penn Public Trust trustee of the VEBA. [See Exhibit "C", p.2].

11. SCM, by its officer plaintiff Michael Zimmerman, caused to be distributed to employees a letter which states: "Full details of the Plan are set forth in a formal Trust Agreement, which is the legal document governing all rights and benefits under the VEBA." [See Exhibits "C15"]

12. PennMont Benefit Services, Inc., is a Delaware corporation, which provides administrative services relating to VEBA's, including the VEBA adopted by SCM. [See Exhibit "C" p.1].

13. As part of its customary duties, PM requested from SCM on numerous occasions during 1994, 1995, 1996, 1997

and 1998 important data relevant to the proper administration of the VEBA. [See Exhibits "H" and "N"].

14. SCM routinely failed to provide data necessary for the proper administration of the VEBA. [See Exhibits "H", "K", "N", "T", "U", "V"].

15. PM did not receive census data for SCM employees relating to the years 1993 and 1994 until November 3, 1995. [See Exhibit "N"].

16. PM did not receive census data for SCM employees relating to the year 1997 until August 5, 1998. [See Exhibit "N"].

17. As a result of SCM's failure to fulfill plan administrative requirements, two employees who became eligible for benefits on January 1, 1998 were not provided same by SCM. [See Exhibit "N"]

18. As of August 19, 1998, SCM had failed to supply participant census information for the years 1995 and 1996, so PM was unable to determine a liability for coverage for any employees who might have been employed during this time. [See Exhibit "N"].

19. On or about July 1, 1996, Corestates Bank, N.A., agreed to become Trustee of the Regional Employers' Assurance Leagues VEBA Trust ("REAL VEBA"). [See Exhibit "G"]. Pursuant to section 1.1 of a new Amended and Restated Master Trust Agreement executed on that date, employers who wanted to adopt the REAL VEBA were re-

quired to execute a certain Consent to Become Party to Trust Agreement. [See Exhibit "G14"].

20. Every employer who was formerly in the League VEBA, except SCM, executed the Consent to Become party to the REAL VEBA Trust Agreement. [See Exhibit "T"].

21. On December 10, 1997, I notified Mr. Zimmerman and SCM by letter of "certain requirements for continued participation in REAL VEBA." Specifically, I asked SCM to provide an updated Employee Census for the year 1997. I also notified SCM of the requirement that it execute a Consent to Become Party to Trust Agreement, because CoreStates Bank had become Trustee. Finally, I notified SCM that Participation Agreements had to be signed by each employee. I enclosed all of the aforesaid documents with my letter, including invoices for administrative services and trustee fees. [See Exhibit "H"].

22. On December 23, 1997, Zimmerman wrote back to me, "in response to [my] letter dated December 10, 1997." At that time, he wanted "to discuss the ramifications of discontinuing participation." [See Exhibit "I"].

23. In satisfaction of SCM's alleged dissatisfaction with the VEBA plan, PM waived SCM's administrative fee for 1996. [See Exhibit "I"].

24. On February 12, 1998, I sent Zimmerman and SCM the same forms which were sent on December 10, 1997, to wit: Participation Agreements for each employee and a Cosent to be party to the Trust Agreement. These forms were neither signed nor returned. [See Exhibit "N"].

25. On July 20, 1998 and again on August 6, 1998, I again sent the aforesaid Consent to Be Party to Trust Agreement. These forms were neither signed nor returned. [See Exhibit "N"].

26. On August 19, 1998, I sent Zimmerman and SCM a detailed letter repeating participation requirements. I again enclosed the Participation Agreements for each employee and the Consent to be Party to Trust Agreement. Again, these forms were neither signed nor returned. [See Exhibit "N"].

27. Because of SCM's refusal to execute the Consent to be Party to Trust Agreement, SCM never became an employer participating in the REAL VEBA plan and trust. [See Exhibit "G", section 1.1].

28. Accordingly, due to its own failure to execute required documents, beginning on December 10, 1997, employees of SCM could not derive benefits from REAL VEBA.

29. Section 3.07 of the VEBA Plan Document [See Exhibit "D"] in force during all relevant periods states as follows:

> Voluntary Participation. . . .Each eligible employee shall complete an Employee Participation Agreement on such forms as may be provided by the plan Administrator, in order to participate.

30. Because no SCM employees executed the Employee Participation Agreements, none of the SCM employees were eligible to receive benefits from REAL VEBA.

31. Section 3.01 (e) of the VEBA Plan Document [See Exhibit "D"] in force during all relevant periods states as follows;

> Duration of Participation: An Employee who otherwise meets the requirements for eligibility and participation contained herein shall be a participant in this plan only during the period the Employer is a member of the League. Upon termination of the Employer's League membership, whether voluntary or involuntary, the Employee shall have no further right to the benefits hereunder, including without limitation, those benefits for which claims have been made but not yet paid on the date League membership terminates.

32. SCM never agreed to become a member of the Regional Employers' Assurance Leagues, and therefore, its Employees never became participants in REAL VEBA.

33. In July 1998, Zimmerman and Barry Shiffman contacted our offices to inform us that an SCM employee, Jean Waitt, had died. They informed us that Jean Waitt had allegedly embezzled a large sum of money from SCM. Zimmerman wanted any insurance money payable on her life. [See Exhibits "J", "K", and "L"].

34. John Koresko, Esquire, reminded Zimmerman and Shiffman that such a payment to a creditor would violate the

anti-alienation clause in the Plan and Trust documents [see Exhibit "D", sec. 10.04; Exhibit "F", sec. 9.03; Exhibit "G", sec. 12.8], and it would also violae the "bad boy" clause which disqualifies employers from benefits if they enaged in embezzlement. [See Exhibit "K"].

35. At all relevant times, the VEBA Plan [See Exhibit "D", p.10] contained a disqualification clause, known as the "bad boy clause," as follows:

> General Limitation on Benefit Payment-Notwithstanding any provisions of this Plan and Trust, a Participant who has less than ten (10) years of participation shall forfeit any benefit payable hereunder if it is determined by the Plan Administrator that he has engaged in a disqualifying act with respect to the Employer, Employees, or to the League. A Participant shall be deemed to have engaged in a disqualifying act if he is determined by the Plan Administrator to have: (1) been guilty of committing theft, fraud, or embezzlement with respect to the Employer; or (2) committed any criminal or malicious act [not rising to the level of a crime] which damages the person or property of the Employer, Employees or the League. The judgment of the Plan Administrator as to whether a Participant has committed a disqualifying act shall be final, unless without evidence to support such judgment.

36. Zimmerman became enraged that we would not pay the Jean Waitt death benefit to him, and he then turned the matter over to his lawyers, Mr. Osborne and Mr. Kriezman. [See Exhibits "L", "Z"]

37. On July 8, 1998, Mr. Osbourne wrote to PM and reiterated that SCM had claims against the Estate of Jean Waitt. He requested various pieces of information. [See Exhibit "J"].

38. On July 21, 1998, John Koresko, Esquire, wrote to Mr. Osborne that any payment to SCM out of death benefits for Jean Waitt would be a breach of the anti-alienation clause in the VEBA documents. Further, Mr. Koresko communicated that because Zimmerman had failed to obtain Participation Agreement, Jean Waitt was not a participant pursuant to the exclusion in section 3.07 of the Plan. Finally, Mr. Osbourne was told of the "bad boy" clause in the plan which disqualified dishonest employees from benefits. Mr. Koresko offered to refund any premiums paid on behalf of the policies held by PPT on behalf of Jean Waitt pursuant to the mistake of fact provisions in the Plan document. [See Exhibit "K"].

39. On August 6, 1998, Zimmerman and SCM wrote to Mr. Koresko. Zimmerman referred to the letter written by Mr. Koresko to Mr. Osborne. Zimmerman appeared to deny that he had seen Participation Agreements, although clearly on December 23, 1997, he had written to us in connection with the letter that contained the Participation Agreements. [See Exhibit "L"].

40. At this point, it became clear to us that Zimmerman was going to try to set us up because of his own failure to satisfy the administrative requirements for plan participation. For example, on page 2 of his August 6 letter, Zimmerman said he had not heard from us since December 23, 1997,

when in fact, I had sent him the forms on February 12, 1998 and July 29, 1998.

41. On August 28, 1998, Zimmerman and SCM again requested information to terminate their "plan." [See Exhibit "P"].

42. On October 22, 1998, Zimmerman and SCM regarding cash value information attributable to policies on the lives of Zimmerman and his mother, and how employees would share in those cash values assuming immediate distribution. [See Exhibit "P"]

43. On November 9, 1998, I wrote a letter to Zimmerman and supplied additional information regarding termination procedures. [See Exhibit "Q"].

44. On November 17, 1998, I wrote another fax letter to Zimmerman in which I clarified eligibility for termination distributions. [See Exhibit "R"].

45. On November 19, 1998, John Koresko, Esquire, sent a letter to Zimmerman to clarify the rights of employees in the assets of the terminated plan and to re-state that any policy on Jean Waitt was an asset of the VEBA trust, in general. Mr. Koresko also clarified that no payment could be made to Zimmerman or SCM because such a payment would violate the VEBA Plan Documents and constitute a prohibited reversion and a breach of fiduciary duty. [See Exhibit "S"].

46. On December 3, 1998, we requested written confirmation of SCM's intentions with respect to continuing in the VEBA. None was received. [See Exhibit "T"].

47. On December 3, 1998, we notified Zimmerman and SCM that any death benefits were suspended because of termination. [See Exhibit "C", p. 16, sec. 9.04]. The reasons for termination were refusal to SCM to complete the documents required for participation which had been repeatedly requested since December, 1997. Also, SCM failed to make required premium contributions to the plan. [See Exhibit "T"].

48. In the letter of December 24, 1998, SCM was accorded a period for cure including execution of the Consent to Be a Party to Trust Agreement and remittance of unpaid premiums and administrative and trustee fees. SCM refused. [See Exhibit "T", "U"].

49. On January 27, 1999, Mr. Koresko again advised Zimmerman and SCM of the reasons for termination from REAL VEBA stated in the letter of December 24, 1998. An opportunity to cure was again extended. SCM refused to comply. [See Exhibit "U", "V"].

50. On February 3, 1999, Mr. Koresko sent a Final Notice of Termination. [See Exhibit "V"].

51. On February 4, 1999, Zimmerman sent me a letter [Exhibit "W"] in which he blatantly misrepresented that "Penn-Mont has failed to fully communicate with [SCM since] Dec. of 1997." [See Exhibits "H" through "V"].

52. On February 22, 1999, I sent SCM and Zimmerman the customary forms and releases which are required to permit distribution of cash value amounts to employees. [See Exhibit "Y"].

53. After receiving comments from SCM's counsel [Exhibit "Z"], on March 1, 1999, we sent a new release form to SCM and Zimmerman. [See Exhibit "AA"].

54. On March 4 1999, Zimmerman sent us a fax in which he indicated his refusal to sign the release forms required by PM and the Trustee. [See Exhibit "BB"].

55. On June 24, 1999, at the request of Zimmerman's lawyer Steven Horowitz, Esquire, PM provided another set of releases and termination documents for signature by SCM and its employees. [See Exhibit "DD"]. Those releases were not executed or returned by SCM or the Zimmermans, but other employees did execute their releases.

56. On or about November 12, 1999, we sent another set of release forms so that nay policies could be cased-in and funds distributed. Neither SCM nor the Zimmermans returned the documents. [See Exhibit "FF"].

57. On June 6, 2000, Mr. Koresko sent a reminder notice to Zimmerman and attorney Joel Kreizman that although certain policies on the lives of the Zimmermans were being maintained by the Trustee, any death benefit proceeds would be used only for reimbursement of Trust expenses because the plan had terminated. [See Exhibit "GG"].

58. On December 11, 2000, Mr. Koresko sent an advisory to the same SCM employees who were sent releases on June 24, 1999. This advisory acknowledged PM's receipt of some signed releases and informed SCM employees that because Zimmerman and SCM refused to execute the required documentation no distribution had occurred and that possibly

no funds would be available for distribution. SCM employees were further advised that litigation had ensued by SCM against PM, and that PM had instituted the instant action. The advisory further notified employees that they may have legal rights for which they might consult counsel. [See Exhibit "HH"].

59. As of this date:

(a) SCM had never executed its Consent to Be a Party to Trust Agreement, and therefore, has never adopted the Regional Employers Assurance Leagues VEBA Plan and Trust as Amended and Restated July 1, 1996;

(b) SCM's employees have never executed Participation Agreements as required by the Plan in order to participate in REAL VEBA;

(c) SCM has refused to execute any of the documentation necessary to complete distribution of any assets remaining from its old plan and has failed to make premium payments necessary to keep any VEBA insurance policies in force;

(d) In 1998, at the time of Jean Waitt's death, SCM had not provided any census information for the years 1995, 1996, 1997 or 1998, so it was impossible for Plan Administrator or Trustee to confirm who eligible participants were at that time;

(e) No claim for benefits has even been made on account of the alleged death benefits relating to the death of Jean Waitt, and the administrative procedures relating to claims

outlined in the Plan document have not been followed [see Exhibit C, p.9-10, sec. 5.06 et seq.];

(f) The claim on account of Jean Waitt death expired by operation of the Plan and Trust document because SCM was never a member of the Leagues VEBA and was terminated from membership prior to payment of the claim, pursuant to section 3.01 (e) of the Plan document [See Exhibit C];

(g) The claim for benefits on account of the death of Jean Waitt forfeited by operation of the "bad boy" clause of the plan because, as Plaintiffs have asserted both in communications to the Plan Administrator and in their complaint, Jean Waitt committed acts of "embezzlement or a criminal or malicious act against the Employer."

(h) Neither REAL VEBA, REAL, PM or Larry Koresko have received the proceeds from any policy payable on the life of Jean Waitt.

(i) PM, the Trustee, and the Plan are entitled to complete indemnification from SCM or any plan balances because of the legal actions taken by the Plaintiffs in this action, pursuant to the express provisions of section 2.09 and 10.1 of the Plan [Exhibit "C"] as well as any VEBA trust document which is found to apply. [See Exhibit "F", sec. 5.07, 5.09, 6.06, 6.07, Exhibit "D" sec 10.10, Exhibit "G", sec. 7.5].

(j) Neither SCM, Zimmerman, nor Craig Waitt are entitled to any relief against the Defendants by operation of the Plan Documents, ERISA, and other applicable law.

FURTHER AFFIANT SAYETH NAUGHT.
Dated: 6/15/01

JEANNE D. BONNEY, ESQUIRE

SUBSCRIBED AND SWORN
BEFORE ME THIS 15
DAY OF JUNE, 2001.

NOTARY PUBLIC

FURTHER AFFIANT SAYETH NAUGHT.

Dated: 6-15-01

JEANNE D. BONNEY, ESQUIRE

SUBSCRIBED AND SWORN
BEFORE ME THIS 15
DAY OF JUNE, 2001.

NOTARY PUBLIC

APPENDIX R – SECOND AFFIDAVIT OF JEANNE D. BONNEY, ESQ. DATED NOVEMBER 30, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SIDNEY CHARLES	:	NO. 00-2134 (WGB)
MARKETS, INC.,	:	
MICHAEL ZIMMERMAN,	:	
AND CRAIG WAITT, individually	:	
and as sole beneficiary of the	:	
ESTATE OF JEAN WAITT,	:	
deceased	:	
Plaintiffs	:	
	:	
vs.	:	
	:	
PENN-MONT BENEFIT	:	
SERVICES, INC.,	:	
LAWRENCE KORESKO,	:	
and REGIONAL EMPLOYERS	:	
ASSURANCE LEAGUES,	:	
Defendants	:	

SECOND AFFIDAVIT OF
JEANNE D. BONNEY, ESQUIRE

I, Jeanne D. Booney, Esquire, being duly sworn according to law, state the following:

1. I am an attorney at law admitted in New Jersey and Pennsylvania .

2. At all times relevant hereto, I was counsel to PennMont Benefit Services, Inc. ("PM") in connection with the matters involving Plaintiffs and Defendants.

2a. The documents attached hereto as Exhibits are true and correct copies of documents regarding this matter in the possession of PM.

3. Prior to 1994, Plaintiff Sidney Charles Markets, Inc. ("SCM") adopted a welfare benefit plan under the Southern California Retail Merchants League VEBA Trust ("SoCal VEBA"). [See Exhibit "A"].

4. On or about January 18, 1994, SCM removed California Central Trust Bank ("CalTrust") and named Penn Public Trust, a Pennsylvania nonprofit corporation ("PPT"), Trustee of its welfare benefit plan. [See Exhibits "A and B"].

5. On or about January 18, 1994, SCM directed CalTrust, the trustee of the SoCal VEBA, to transfer three life insurance policies and any other assets of said plan to PPT. [See Exhibit "A"].

6. SCM took the aforesaid actions as part of a tax reduction strategy at the insistence and request of its insurance agent, Barry Shiffman. [See Exhibit "C, p.9, C12"].

7. On or about December 31, 1993, SCM executed Adoption Agreements to join the Delaware Valley League of Merchants North ("League") [See Exhibit "C"] and adopted the League's "Voluntary Employees' Beneficiary Association Heath and Welfare plan [See Exhibit "D"] and its com-

panion Trust [See Exhibit "F"] The Plan and Trust are collectively referred to as the "VEBA".

7a. The League VEBA was recognized by the Internal Revenue Service as an exempt organization pursuant to 26 U.S.C. § 501 (c)(9) on March 24, 1994. [See Exhibit "E"].

8. The Adoption Agreement names Penn Public Trust trustee of the VEBA. [See Exhibit "C", p.2].

9. SCM, by its officer plaintiff Michael Zimmerman, caused to be distributed to employees a letter which states: "Full details of the Plan are set forth in a formal Trust Agreement, which is the legal document governing all rights and benefits under the VEBA." [See Exhibit "C15"].

10. PennMont Benefit Services, Inc. is a Pennsylvania corporation, which provides administrative services relating to VEBAs, including the VEBA adopted by SCM. [See Exhibit "C" p.1].

11. As part of its customary duties, PM requested from SCM on numerous occasions during 1994, 1995, 1996, 1997 and 1998 important data relevant to the proper administration of the VEBA. [See Exhibits "H" and "N"].

12. SCM routinely failed to provide data necessary for the proper administration of the VEBA. [See Exhibits "H", "K", "N", "T", "U", "V"].

13. PM did not receive census data for SCM employees relating to the years 1993 and 1994 until November 3, 1995. [See Exhibit "N"].

14. PM did not receive census data for SCM employees relating to the year 1997 until August 5, 1998. [See Exhibit "N"].

15. As a result of SCM's failure to fulfill plan administrative requirements, two employees who became eligible for benefits on January 1, 1998 were not provided same by SCM. [See Exhibit "N"].

16. As of August 19, 1998, SCM had failed to supply participant census information for the years 1995 and 1996, so PM was unable to determine a liability for coverage for any employees who might have been employed during that time. [See Exhibit "N"].

17. On or about July 1, 1996, CoreStates Bank, N.A., agreed to become Trustee of the Regional Employers' Assurance Leagues VEBA Trust ("REAL VEBA"). [See Exhibit "G"]. Pursuant to section 1.1 of a new Amended and Restated Master Trust Agreement executed on that date, employers who wanted to adopt the REAL VEBA were required to execute a certain Consent to Become Party to Trust Agreement. [See Exhibit "G14"].

18. Every employer who was formerly in the League VEBA, except SCM, executed the Consent to Become Party to the REAL VEBA Trust Agreement. [See Exhibit "T"].

19. On December 10, 1997, I notified Mr. Zimmerman and SCM by letter of "certain requirements for continued participation in REAL VEBA." Specifically, I asked SCM to provide an updated Employee Census for the year 1997. I also notified SCM of the requirement that it execute a Con-

sent to Become Party to Trust Agreement; because Core-States Bank had become Trustee. Finally, I notified SCM that Participation Agreements had to be signed by each employee. I enclosed all of the aforesaid documents with my letter, including invoices for administrative services and trustee fees. [See Exhibit "H"].

20. On December 23, 1997, Zimmerman wrote back to me, "in response to [my] letter dated December 10, 1997." At that time, he wanted "to discuss the ramifications of discontinuing participation." [See Exhibit "I"].

21. In satisfaction of SCM's alleged dissatisfaction with the VEBA plan, PM waived SCM's administrative fee for 1996. [See Exhibit "I"].

22. On February 12, 1998, I sent Zimmerman and SCM the same forms which were sent on December 10, 1997, to wit: Participation Agreements for each employee and a Consent to be Party to the Trust Agreement. These forms were neither signed nor returned. [See Exhibit "N"].

23. On July 20, 1998 and again on August 6, 1998, I again sent the aforesaid Consent to Be Party to Trust Agreement. These forms were neither signed nor returned. [See Exhibit "N"].

24. On August 19, 1998, I sent Zimmerman and SCM a detailed letter repeating participation requirements. I again enclosed the Participation Agreements for each employee and the Consent to be Party to Trust Agreement. Again, these forms were neither signed nor returned. [See Exhibit "N"].

25. Because of SCM's refusal to execute the Consent to be Party to Trust Agreement, SCM never became an employer participating in the REAL VEBA plan and trust. [See Exhibit "G", section 1.1].

26. Accordingly, due to its own failure to execute required documents, beginning on December 10, 1997, employees of SCM could not derive benefits from REAL VEBA.

27. Section 3.07 of the VEBA Plan Document [See Exhibit "D"] in force during all relevant periods states as follows:

> Voluntary Participation-. . . Each eligible employee shall complete an Employee Participation Agreement on such forms as may be provided by the Plan Administrator, in order to participate.

28. Because no SCM employees executed the Employee Participation Agreements, none of the SCM employees were eligible to receive benefits from REAL VEBA.

29. Section 3.01 (e) of the VEBA Plan Document [See Exhibit "D"] in force during all relevant periods states as follows:

> Duration of Participation: An Employee who otherwise meets the requirements for eligibility and participation contained herein shall be a participant in this plan only during the period the Employer is a member of the

League. Upon termination of the Employer's League membership, whether voluntary or involuntary, the Employee shall have no further right to the benefits hereunder, including without limitation, those benefits for which claims have been made but not yet paid on the date League membership terminates.

30. SCM never agreed to become a member of the Regional Employers' Assurance Leagues, and therefore, its Employees never became participants in REAL VEBA.

31. In July 1998, Zimmerman and Barry Shiffman contacted our offices to inform us that an SCM employee, Jean Waitt, had died. They informed us that Jean Waitt had allegedly embezzled a large sum of money from SCM. Zimmerman wanted any insurance money payable on her life. [See Exhibits "J", "K" and "L"].

32. John Koresko, Esquire, reminded Zimmerman and Shiffman that such a payment to a creditor would violate the anti-alienation clause in the Plan and Trust documents [see Exhibit "D", sec. 10.04; Exhibit "F", sec. 9.03; Exhibit "G", sec. 12.8], and it would also violate the "bad boy" clause which disqualifies employees from benefits if they engaged in embezzlement. [See Exhibit "K"].

33. At all relevant times, the VEBA Plan [See Exhibit "D", p. 10] contained a disqualification clause, known as a "bad boy clause," as follows:

General Limitation on Benefit Payment-Notwithstanding any provisions of this Plan and Trust, a Participant who has less then ten (10) years of participation shall forfeit any

benefit payable hereunder if it is determined by the Plan Administrator that he has engaged in a disqualifying act with respect to the Employer, Employees, or to the League. A Participant shall be deemed to have engaged in a disqualifying act if he is determined by the Plan Administrator to have: (1) been guilty of committing theft, fraud, or embezzlement with respect to the Employer; or (2) committed any criminal or malicious act [not rising to the level of a crime] which damages the person or property of the Employer, Employees or the League. The judgment of the Plan Administrator as to whether a Participant has committed a disqualifying act shall be final, unless without evidence to support such judgment.

34. Zimmerman became enraged that we would not pay the Jean Waitt death benefit to him, and he then turned the matter over to his lawyers, Mr. Osborne and Mr. Kreizman. [See Exhibits "L", "Z"].

35. On July 8, 1998, Mr. Osborne wrote to PM and reiterated that SCM had claims against the Estate of Jean Waitt. He requested various pieces of information. [See Exhibit "J"].

36. On July 21, 1998, John Koresko, Esquire, wrote to Mr. Osborne, responded to the information request, and informed Mr. Osborne that any payment to SCM out of death benefits for Jean Waitt would be a breach of the anti-alienation clause in the VEBA documents. Further, Mr. Koresko communicated that because Zimmerman had failed to obtain Participation Agreements from his employees, and Jean Waitt failed to execute a Participation Agreement, Jean Waitt was not a participant pursuant to the exclusion in section 3.07 of the Plan. Finally, Mr. Osborne was told of the

"bad boy" clause in the plan which disqualified dishonest employees from benefits. Mr. Koresko offered to refund any premiums paid on behalf of the policies held by PPT on behalf of Jean Waitt pursuant to the mistake of fact provisions in the Plan document. [See Exhibit "K"].

37. On August 6, 1998, Zimmerman and SCM wrote to Mr. Koresko. Zimmerman referred to the letter written by Mr. Koresko to Mr. Osborne. Zimmerman appeared to deny that he had seen Participation Agreements, although clearly on December 23, 1997, he had written to us in connection with the letter that contained the Participation Agreements. [See Exhibit "L"].

38. At this point, it became clear to us that Zimmerman was going to try to set us up because of his own failure to satisfy the administrative requirements for plan participation. For example, on page 2 of his August 6 letter, Zimmerman said he had not heard from us since December 23, 1997, when in fact, I had sent him the forms on February 12, 1998 and July 20, 1998.

39. On August 28, 1998, Zimmerman and SCM again requested information to terminate their "plan." [See Exhibit "P"].

40. On October 22, 1998, I informed Zimmerman and SCM regarding cash value information attributable to policies on the lives of Zimmerman and his mother, and how employees would share in those case values assuming immediate distribution. [See Exhibit "P"].

41. On November 9, 1998, I wrote a letter to Zimmerman and supplied additional information regarding termination procedures. [See Exhibit "Q"].

42. On November 17, 1998, I wrote another fax letter to Zimmerman in which I clarified eligibility for termination distributions. [See Exhibit "R"].

43. On November 19, 1998, John Koresko, Esquire, sent a letter to Zimmerman to clarify the rights of employees in the assets of the terminated plan to re-state that any policy on Jean Waitt was an asset of the VEBA trust, in general. Mr. Koresko also clarified that no payment could be made to Zimmerman or SCM because such a payment would violate the VEBA Plan Documents and constitute a prohibited reversion and a breach of fiduciary duty. [See Exhibit "S"].

44. On December 3, 1998, we requested written confirmation of SCM's intentions with respect to continuing in the VEBA . None was received. [See Exhibit "T"].

45. On December 24, 1998, we notified Zimmerman and SCM that any death benefits were suspended because of termination. [See Exhibit "C", p. 16, sec. 9.04]. The reasons for termination were refusal of SCM to complete the documents required for participation which had been repeatedly requested since December, 1997. Also, SCM failed to make required premium contributions to the plan. [See Exhibit "T"].

46. In the letter of December 24, 1998, SCM was accorded a period for cure including execution of the Consent to Be A Party to Trust Agreement and remittance of unpaid

premiums and administrative and trustee fees. SCM refused [See Exhibit "T", "U"].

47. On January 27, 1999, Mr. Koresko again advised Zimmerman and SCM of the reasons for termination from REAL VEBA stated in the letter of December 24, 1998. An opportunity to cure was again extended. SCM refused to comply. [See Exhibit "U", "V"].

48. On February 3, 1999, Mr. Koresko sent a Final Notice of Termination. [See Exhibit "V"].

49. On February 4, 1999, Zimmerman sent me a letter [Exhibit "W"] in which he blatantly misrepresented that "Penn-Mont has failed to fully communicate with [SCM since] Dec. of 1997." [See Exhibits "H" through "V"].

49. On February 22, 1999, I sent SCM and Zimmerman the customary forms and releases which are required to permit distribution of cash value amounts to employees. [See Exhibit "Y"].

50. After receiving comments from SCM's counsel ["Exhibit "Z"], on March 1, 1999, we sent a new release form to SCM and Zimmerman. [See Exhibit "AA"].

51. On March 4, 1999, Zimmerman sent us a fax in which he indicated his refusal to sign the release forms required by PM and the Trustee. [See Exhibit "BB"].

52. On June 24, 2999, at the request of Zimmerman's lawyer Steven Horowitz, Esquire, PM provided another set of releases and termination documents for signature by SCM

and its employees. [See Exhibit "DD"]. Those releases were not executed or returned by SCM or the Zimmermans, but other employees did execute their releases.

52. On or about November 12, 1999, we sent another set of release forms so that any policies could be cashed-in and funds distributed. Neither SCM nor the Zimmermans returned the documents. [See Exhibit "FF"].

53. On June 6, 2000, Mr. Koresko sent a reminder notice to Zimmerman and attorney Joel Kreizman that although certain policies on the lives of the Zimmermans were being maintained by the Trustee, any death benefit proceeds would be used only for reimbursement of Trust expenses because the plan had terminated. [See Exhibit "GG"].

54. As of this date:

(a) SCM had never executed its Consent to Be a Party to Trust Agreement, and therefore, has never adopted the Regional Employers Assurance Leagues VEBA Plan and Trust as Amended and Restated July 1, 1996;

(b) SCM's employees have never been executed Participation Agreements as required by the Plan in order to participate in REAL VEBA;

(c) SCM has refused to execute any of the documentation necessary to complete distribution of any assets remaining from its old plan and has failed to make premium payments necessary to keep any VEBA insurance policies in force;

(d) In 1998, at the time of Jean Waitt's death, SCM had not provided any census information for the years 1995, 1996, 1997 or 1998, so it was impossible for Plan Administrator or Trustee to confirm who eligible participants were at that time;

(e) No claim for benefits has ever been made on account of the alleged death benefit relating to the death of Jean Waitt, and the administrative procedures relating to claims outlined in the Plan document have not been followed [see Exhibit C, p. 9-10, sec. 5.06 et seq.];

(f) The claim on account of the Jean Waitt death expired by operation of the Plan and Trust document because SCM was never a member of the League's VEBA and was terminated from membership prior to payment of the claim, pursuant to section 3.01 (e) of the Plan document [see Exhibit C];

(g) The claim for benefits on account of the death of Jean Waitt was forfeited by operation of the "bad boy" clause of the plan because, as Plaintiffs have asserted both in communications to the Plan Administrator and in their complaint, Jean Waitt committed acts of "embezzlement or a criminal or malicious act against the Employer."

(h) Neither REAL VEBA, REAL, PM or Larry Koresko have received the proceeds from any policy payable on the life of Jean Waitt.

(i) PM, the Trustee, and the Plan are entitled to complete indemnification from SCM or any plan balances because of the legal actions taken by the Plaintiffs in this action, pursu-

ant to the express provisons of section 2.09 and 10.1 of the Plan [Exhibit "C"] as well as any VEBA trust document which is found to apply. [See Exhibit "F", sec. 5.07, 5.09, 6.06, 6.07, Exhibit "D" sec. 10.10, Exhibit "G", sec. 7.5].

(j) Neither SCM, Zimmerman, nor Craig Waitt are entitled to any relief against the Defendants by operation of the Plan Documents, ERISA, and other applicable law.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: 11/30/00

_____
JEANNE D. BONNEY, ESQUIRE

SUBSCRIBED AND SWORN
BEFORE ME THIS 6th
DAY OF DECEMBER, 2000.

_____
NOTARY PUBLIC